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OCTOBER TERM, 1979

No. 79-408

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,
Petitioners,

v.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR PETITIONERS

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals dated April 26, 1979 is reported at 599 F.2d 151, and is reproduced in the Appendices to the Petition for a Writ of Certiorari dated September 11, 1979 (bound separately, and referred to herein as "Pet App.") at A-1 *et seq.* The opinion of the Court of Appeals was accompanied by an unpublished order dated April 26, 1979 which was

not officially reported, but which is unofficially reported at 13 E.R.C. 1069 and reproduced at Pet. App. B-1 *et seq.* An order denying a petition by the State of Illinois for a rehearing was entered by the Court of Appeals on June 14, 1979 and is reproduced at Pet. App. C-1 *et seq.* The judgment order entered by the United States District Court for the Northern District of Illinois on November 15, 1977 is reproduced at Pet. App. D-1 *et seq.* A stipulation between the parties dated November 14, 1977 concerning the District Court's November 15, 1977 judgment order is reproduced at Pet. Opp. E-1 *et seq.* The modified judgment order entered by the United States District Court for the Northern District of Illinois on January 31, 1980 is reproduced in the Joint Appendix (bound separately, and referred to herein as "App.") at 357 *et seq.* ———. (This modified judgment was entered after the issuance of the mandate of the Court of Appeals. The question whether this modified judgment is in accord with the mandate is presently before the Court of Appeals, but proceedings have been stayed pending the Supreme Court's decision in this case.) The opinion of the District Court at the conclusion of the trial on July 29, 1977 was not reported and is reproduced at Pet. App. F-1 *et seq.* The opinion of the District Court dated November 1, 1973 denying petitioners' motion to dismiss the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure is reported at 366 F.Supp. 298 and is reproduced at Pet. App G-1 *et seq.* The opinion of the District Court dated November 16, 1972 denying petitioners' motion to dismiss for lack of personal jurisdiction and improper venue was not officially reported but is unofficially reported at 4 E.R.C. 1849, and is reproduced at Pet. App. H-1 *et seq.*

Mr. Justice Stevens' May 8, 1980 order staying all judgments, decrees and orders entered by the Court of Appeals and the District Court pending the Supreme Court's decision in this case is reproduced at App. 369.

This proceeding had its genesis in this Court's decision in *Illinois* v. *Milwaukee,* 406 U.S. 91 (1972), reproduced at Pet. App. I-1 *et seq.*

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on April 26, 1979. A timely petition for rehearing was denied on June 14, 1979. The petition for writ of certiorari was filed on September 11, 1979, and was granted by this Court on March 17, 1980. This Court's jurisdiction rests upon 28 U.S.C. § 1254(1) and Rule 22(3) of the Supreme Court Rules.

STATUTORY PROVISIONS INVOLVED

1. The Federal Water Pollution Control Act, as amended, 33 U.S.C §§ 1251-1376, is lengthy, and its pertinent provisions are therefore set forth at Pet. App. J-1 *et seq.*

2. Section 17 of the Illinois Civil Practice Act, Ill. Rev. Stat. ch. 110, § 17 (1971), provided in pertinent part as follows at the date the instant action was commenced (it has not been amended in any pertinent respect since then):

> "(1) Any person, whether or not a citizen or resident of this State, who in person or through agent does any of the acts hereinafter enumerated, thereby submits such person . . . to the jurisdiction of the courts of this State as to

any cause of action arising from the doing of any such acts:

* * *

(b) The commission of a tortious act within this State."

3. 28 U.S.C. 1391(b) states:

"A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law."

QUESTIONS PRESENTED

1. Do federal statutes and federal regulations control the federal common law of water pollution nuisance, now that Congress has adopted the Federal Water Pollution Control Act Amendments of 1972 and the Clean Water Act of 1977, acts intended to provide uniformity, finality and an effective remedy to all persons including states in the field of water pollution control, and to assure that similar point sources with similar characteristics will be required to meet similar effluent limitations, by providing for regulatory control of point source discharges by an agency better equipped for the purpose than the courts by reason of specialization, experience and expertise?

2. May the courts conclude that a federal common law nuisance has been established where the trial court found that: (1) fecal coliform counts on Illinois' Lake Michigan beaches failed to demonstrate any pollution coming from Milwaukee; (2) there is no evidence of any outbreak of water-related diseases

in Illinois; (3) there is no evidence that any specific algal, taste or odor problem is attributable to Milwaukee's discharges; (4) it is impossible to measure accurately any effect on the lake caused by Milwaukee's discharges or to measure accurately the diminution in the amount of nutrients in the lake if they were altogether discontinued; and (5) plaintiffs failed to perform studies which they could and should have performed to determine whether pathogens and pollutants in Milwaukee's sewage effluents actually reached plaintiffs' waters?

3. May the courts hold that a federal common law nuisance has been established solely upon expert testimony regarding the theoretical possibility of exposure to relatively short incubation period enteroviral diseases, where the activity posing the theoretical possibility of exposure has existed for many decades, but the trial court expressly found that there is no evidence of any outbreak of any enteroviral disease?

4. May the courts hold that Milwaukee is creating a federal common law nuisance on the basis of express findings by the trial court that: (1) Milwaukee's nutrient discharges to the lake cannot be isolated out, either legally or factually; (2) balancing the equities is difficult to apply because each dollar of expenditure for better sewage treatment cannot be shown to result in a specific amount of benefit to the lake; (3) there is no evidence of Milwaukee's discharges having a present effect on fish life; (4) there is no evidence of any specific algal, taste or odor problem attributable to Milwaukee; and (5) nutrients from many sources, only some of which

emanate from Milwaukee, are causing accelerated eutrophication of the lake?

5. Where federal statutory and administrative provisions establish a federal policy to require a cost-effective approach to pollution control, may the trial court expressly refuse to consider costs and cost-effective considerations, and instead fashion a remedy without any regard whatsoever to such matters?

6. Where the defendants did nothing in the forum state and nothing to avail themselves of the law or of the privilege of conducting activities within that state, did the federal district court located in the forum state have personal jurisdiction over the defendants and did venue properly lie in the Northern District of Illinois?

STATEMENT OF THE CASE

This case had its origin in the Supreme Court's decision in *Illinois* v. *Milwaukee,* 406 U.S. 91 (1972). It presents the first opportunity for this Court to define the scope of its decision in *Illinois* v. *Milwaukee* in light of the subsequent enactment of the Federal Water Pollution Control Act Amendments of 1972 and the Clean Water Act of 1977, and implementation of the nationwide regulatory and funding program created by Congress in that legislation. The decision in this case will determine whether your petitioners, the City of Milwaukee, the Sewerage Commission of the City of Milwaukee, and the Metropolitan Sewerage Commission of the County of Milwaukee (cumulatively, "Milwaukee"), must spend, and if so when they

must spend, literally hundreds of millions of dollars over and above what is required under pollution discharge permits issued pursuant to the new federal statutes. The Court's decision will affect the expenditure of tens of billions of dollars by municipalities across the nation.

In *Illinois* v. *Milwaukee, supra,* the State of Illinois filed a motion for leave to file a complaint under the Supreme Court's original jurisdiction against four cities and two local sewerage commissions of the State of Wisconsin, alleging that the defendants were polluting Lake Michigan, an interstate body of water, and seeking the abatement of the alleged public nuisance. The Court denied the motion for leave to file under the Court's original jurisdiction without prejudice to the right of the State of Illinois to file an action in an appropriate United States District Court. The Court noted that the basis of such an action would be "federal common law", 406 U.S. at 103 (Pet. I-12); that, as of the time of the decision, the federal statutes and regulations provided only for "long-drawn-out" abatement procedures which were not inconsistent with the application of a federal common law to abate a public nuisance in interstate or navigable waters, (*Id.*); *but* that "new federal laws and new federal regulations may in time preempt the field of federal common law of nuisance." 406 U.S. at 107 (Pet. App. I-16).

On May 19, 1972, shortly after the Supreme Court's decision, the State of Illinois commenced the present action in the United States District Court for the Northern District of Illinois.

Five months later, on October 18, 1972, Congress enacted PL 92-500, the Federal Water Pollution Con-

trol Act Amendments of 1972 (the "1972 Act").[1] That enactment substantially replaced the previous language of the Federal Water Pollution Control Act refered to in the Supreme Court's decision, including the Water Quality Act of 1965, the Clean Water Restoration Act of 1966, and the Water Quality Improvement Act of 1970, all of which were amendments to the initial Federal Water Pollution Control Act passed in 1948.

On December 27, 1977, shortly after the entry of the trial court's judgment in this action, Congress enacted and the President signed the Clean Water Act of 1977 (the "1977 Act"), PL 95-217, which amended FWPCA in certain important respects. Among many other changes, Section 41 of the 1977 Act added new Sec. 217 (§ 1297):

> "Any guidelines for cost-effectiveness analysis published by the Administrator under this title shall provide for the identification and selection of cost effective alternatives to comply with the objective and goals of this Act and sections 201 (b), (201d), 201(g)(2)(A), and 301(b)(2)(B) [§§ 1281(b), 1281(d), 1281(g)(2)(A), and 1311 (b)(2)(B)] of this Act."

Thus, Congress dealt with the precise subject matter of this action *before* judgment was entered below, and refined the congressional mandate *after* judgment was entered.

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[1] The Federal Water Pollution Control Act, as amended, is codified in 33 U.S.C. §§ 1251-1376. For ease of cross-reference, the U.S.C. § numbers will be set out in parentheses after the Act's section numbers; viz.: Sec. 301 (§ 1311). The present Federal Water Pollution Control Act, as amended, is referred to herein as either "the Act" or "FWPCA."

A. Description of the Metropolitan Milwaukee Sewerage System and Its Discharge Permit History

Each of the petitioners is a municipal body corporate organized and existing under the laws of the State of Wisconsin.[2]

Although each has separate functions, taken together the petitioners construct, operate and maintain sewer facilities which serve all of Milwaukee County, Wisconsin (except for the City of South Milwaukee). The area served ("Metropolitan Milwaukee Area") is approximately 420 square miles and has a population in excess of 1 million persons (Trial Transcript pp. 9262-9267).

The facilities operated by the petitioners to serve the Metropolitan Milwaukee Area include a series of sewer systems [3] and two sewage treatment plants. The Metropolitan Sewerage Commission of the County of Milwaukee ("Metropolitan Commission") constructs sewers in the Metropolitan Milwaukee Area outside of the City of Milwaukee. Upon completion, sewers constructed by the Metropolitan Commission are transferred to the Sewerage Commission of the City of Milwaukee ("City Commission") which thereafter operates and maintains them along with sewers which it has constructed in the City of Milwaukee. The City Commission also operates and maintains the two sewage

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[2] With respect to the petitioning commissions, see Wis. Stats. §§ 59.96(1) and 62.60-.67 (1977).

[3] Sewer systems may be "separated" systems, in which only sanitary sewage is collected and treated, or "combined" systems which gather both sanitary sewage and storm water runoff and transport them in the same conduits for treatment. Combined systems overflow when their capacities are exceeded because of the presence of large amounts of storm water.

treatment plants. The City of Milwaukee operates and maintains some sewers in the City of Milwaukee.

The two sewage treatment plants, which are respectively 25 and 39 miles from the Illinois border, are designed to provide "secondary" treatment[4] for sewage effluent discharges (e.g., D.Ex. 84, Tr. 4843, Tr. 13628; P.Ex. 89-90, Tr. 693 and 754).[5] The effluent discharge from the main sewage treatment plant is made to Lake Michigan inside of a man-made breakwater three miles from the nearest Milwaukee drinking water intake (D.Ex. 504, Tr. 4024). Other sewage effluent discharges are made from the other plant directly into the lake approximately eight miles from the nearest Milwaukee drinking water intake and approximately one and one-half miles from the drinking water intake of Oak Creek, Wisconsin, and from time to time directly into tributary streams of Lake Michigan from designated "overflow" points in the sewage collection system. (*Id.*)[6] Even with this close juxtaposition of drinking water intakes and effluent points, there is no record showing that the Milwaukee area has experienced en-

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[4] See 599 F.2d at 173-174 (Pet. App. A-40) for a description of "secondary treatment."

[5] References to the trial transcript herein are as follows: "Tr. ——". All exhibits identified by the parties were admitted into evidence at Tr. 13628 except for exhibits specifically excluded by the trial court. Accordingly, record references herein in connection with exhibits specify those places where such exhibits were identified.

[6] "Overflow" is defined in the Judgment Order from which this appeal arises as "a crossover, bypass, diversion structure, relief structure, pump station or any other device or mechanism by which human fecal waste is discharged directly or indirectly to public streams, rivers or lakes without collection and treatment" according to specified standards (Pet. App. D-2).

teroviral or bacterial epidemics, or even minor outbreaks of such diseases.

In 1974 the petitioning City Commission and the City of Milwaukee applied to the State of Wisconsin Department of Natural Resources ("DNR") for permits to discharge the described sewage effluent into Lake Michigan and certain tributary streams in Milwaukee County. Such applications were made pursuant to FWPCA, and procedures adopted thereunder.

Prior to receiving such permit applications, DNR qualified under Section 402 (§ 1342) of FWPCA as a discharge permit-granting agency under the superintending jurisdiction of the United States Environmental Protection Agency ("EPA"). Each and every action of DNR in the premises was in accordance with the requirements of FWPCA and was tacitly or actively approved by EPA (Tr. 9323).

In late 1974, following public notice, including notice to each of the respondents pursuant to Sec. 402 (b)(3) (§ 1342(b)(3)) of FWPCA and hearing (none of the respondents chose to participate therein), DNR issued discharge permits to the City Commission and the City of Milwaukee under which they have operated, are operating, and at all times material herein were operating the sewer system and treatment plants serving the Metropolitan Milwaukee Area. (P.Ex. 62-64, App. 371-454, Tr. 257; D.Ex. 1110, Tr. 7508.)

The permits issued by DNR established specific requirements and parameters for the sewage effluent discharges of the City Commission and the City of Milwaukee. The permit also established timetables for the attainment of such requirements and parameters, pro-

vided for monitoring for compliance, and contemplated enforcement of their terms. (*Id.*)

The City Commission failed in some respects to fully comply with its permit requirements. Pursuant to the permit enforcement authority specified by Sec. 402(b) (§ 1342(b)) of FWPCA, the DNR effectuated enforcement proceedings in Dane County Circuit Court, Dane County, Wisconsin, in an action entitled *The Sewerage Commission of the City of Milwaukee and Metropolitan Sewerage Commission of the County of Milwaukee* v. *State of Wisconsin Department of Natural Resources* (Case No. 152-1342). The permit enforcement action resulted in the entry on May 25, 1977 of a judgment enforcing the City Commission's discharge permit requirements and providing comprehensive timetables for making necessary improvements, including the correction of wet-weather overflows from Milwaukee's combined sewer area (D.Ex. 1311, App. 455-488, Tr. 9417 [renumbered from D.Ex. 1211 to D.Ex. 1311 at Tr. 9720], the "Dane County Order").

Insofar as material here, the discharge permit requirements imposed on Milwaukee, as implemented by the Dane County Order, include the following:

1. Secondary treatment shall be provided for all effluents processed in sewage treatment plants operated by Milwaukee.

2. The secondary treatment shall cause the effluent discharges from the treatment plants to contain no more than 30 parts per million ("30 PPM" or "30 mg/l") suspended solids ("SS") based on a 30 day average, no more than 30 PPM of carbonaceous 5 day biochemical oxygen demand ("BOD_5") based on a 30 day average, no more than 1 PPM phosphorus ("P") based on a 30

day average, and no more than 200 fecal coliform per 100 milliliters based on a 30 day average.

3. Chlorination shall be provided at certain times, but no requirement is imposed as to chlorine residuals.

4. Elimination of dry-weather overflows throughout the system and correction or control of storm induced combined sewer overflows ("CSO") in the combined sewer area is required. Specific relief provisions related to the availability and provision of state and federal funding are included relating to CSO and some sewer extensions, with provision for certain deadline extensions so long as $13 million per year for the combined sewer overflow program and $15 million per year for sewer extensions measured in 1976 dollars of local funds are being expended. (P.Ex. 62-63, App. 371-421, Tr. 257; D.Ex. 1110, Tr. 7508, and D.Ex. 1311, Tr. 9417.)

The cost-effective character of the "correction or control" of CSO required in the permits, and the dependency upon the availability of federal funds, reflect the mandate of the federal statute and are absent in the decisions below.

It must be emphasized that the Dane County Order calls for correction or control of combined sewer overflows. The Dane County Order will be enforced to guarantee the correction or control of combined sewer overflows. The Dane County order is also "cost sensitive" in that combined sewer overflows were recognized by the parties to be only a portion of the problem faced by Milwaukee and that combined sewer overflows, once several major overflow points were eliminated, would have a lesser priority than other remedial work being undertaken by Milwaukee. For that reason, the Dane

County order was drafted to require continuous progress toward control of combined sewer overflows on a schedule which reflected the fact that federal funds might not be available in certain years in the quantity necessary for optimum progress. (*Id.*)

B. Procedural History

This case commenced on May 19, 1972, shortly after this Court's decision in *Illinois* v. *Milwaukee, supra.* The Illinois' complaint (App. 23-32) was served upon the defendants pursuant to the Illinois long-arm statute, Ill. Rev. Stat. ch. 110, § 17 (1971) (see "Statutory Provisions Involved," *supra*). Subsequent to service of the complaint, Milwaukee moved to dismiss the action on the ground that the trial court lacked personal jurisdiction, and that venue of the action did not properly lie in the Northern District of Illinois. The District Court denied these motions. *Illinois* v. *Milwaukee,* 4 E.R.C. 1849 (N.D. Ill. 1972) (Pet. App. H-1 *et seq.*). Milwaukee then moved to dismiss the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. This motion was also denied. *Illinois* v. *Milwaukee,* 366 F.Supp. 298 (N.D. Ill. 1973) (Pet. App. G-1 *et seq.*).

Trial to the court commenced on January 11, 1977. It spanned six months, produced over 14,000 pages of transcript, hundreds of exhibits, and focused upon highly technical subject matter requiring extensive use of expert testimony in attempts to explain, teach and interpret complex scientific issues in such fields as limnology, oceanography and virology, as well as sophisticated engineering concepts. The respondents' experts limited themselves to theorizing to their conclusions, but Milwaukee's experts reviewed actual tests

performed by the Milwaukee experts in Lake Michigan, as well as reviewing the applicable scientific theories. It was in this setting that the trial court, at the conclusion of the case, rejected briefs and dictated a decision from the bench. In the trial court's words:

> "Ordinarily, when the trier of facts weighs evidence and attempts to come to factual conclusions, he does so in the light of his own experience and his own observations and his own common sense. Not only is this proper to do, it is something that we specifically instruct juries to do in every jury case.
>
> The nature of the subject matter here, however, is such that my own experience and observations in life are of relatively little use to me. It is well known to all of us that the arcane subject matter of some of the expert testimony in this case was sometimes over the heads of all of us to one height or another. I would be certainly less than candid if I did not acknowledge that my grasp of some of the testimony was less complete than I would like it to be, but short of enrolling in a university course directed toward a reorientation of my entire education and spending the years that that would involve, I know of no remedy for the problem." (Pet. App. F-3 and 4.)

Significantly, the trial court did not, as a "remedy for the problem," defer to the expertise of the administrative body set up by Congress to deal with the subject.

In subsequent hearings before the District Court on September 9, 1977 and November 14, 1977, where the remedy was under consideration, the District Court clearly indicated that the two previously imposed requirements of the court, i.e., (1) to completely "elimi-

nate" all overflows; and (2) to meet the effluent limitations specified by the court,[7] were both to be applicable without respect to their costs, without benefit of any cost-effective analysis and without regard to the availability of federal funding under FWPCA, which funding is limited to cost-effective solutions to pollution control (Transcript of September 9, 1977 hearing before the District Court at 107-111; Transcript of November 14, 1977 hearing before the District Court at 38 and 56). Thus, the District Court precluded evidence on cost-effective methods of controlling sewer overflows.

C. Decision of the District Court and the Court of Appeals

During the trial the State of Illinois failed to call a single witness who had any direct responsibility for public health in that state. The witnesses presented by Illinois had no specific experience with public health in the State of Illinois, the City of Milwaukee or Lake Michigan. They were witnesses who were qualified as "experts," who testified with respect to general scientific principles, and who reached conclusions therefrom with respect to Illinois, Milwaukee and Lake Michigan. While the District Court favorably commented upon the credentials of all of the expert witnesses who testified at the trial, the court also noted that all of the witnesses were interested in the outcome of the case and none of them were neutral as between the parties or as to the outcome of the case (Pet. App. F-4). The determination of liability and remedy to be imposed

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[7] This portion of the District Court judgment was reversed by the Court of Appeals, 599 F.2d at 177 (Pet. App. A-48), and Milwaukee seeks review only of the requirement to eliminate all sewer overflows.

upon Milwaukee was reached in the face of the following express findings by the District Court:

1. The State of Illinois could have performed studies to determine whether Milwaukee sewage effluents are sufficiently diluted by Lake Michigan or inactivated by other means so that only insignificant numbers of pathogens and other pollutants, if any, could reach Illinois waters. Illinois elected not to do so, and in so electing chose to produce less evidence than it should have (Pet. App. F-10).

2. There are fecal coliform counts on Illinois beaches which fail to demonstrate any pollution coming from Milwaukee (Pet. App. F-11).

3. There is no evidence of any outbreak of water-related diseases in Illinois (Pet. App. F-12).

4. There is no evidence of any present effect of Milwaukee discharges or, for that matter, of the effect of any other nutrient discharges, on fish life in the lake (Pet. App. F-18).

5. There is no evidence that any specific algal prob-- lem or any specific taste and odor problem experienced by residents of Illinois or Michigan is attributable to Milwaukee sewage as opposed to the nutrients discharged by any other point or non-point sourse. (*Id.*)

6. It is impossible to measure accurately any effect on the lake caused by Milwaukee's discharges, or to measure accurately the diminution in the amount of nutrients in the lake which would result if Milwaukee discharges were altogether discontinued (Pet. App. F-19).

Based on this record, the District Court entered judgment in favor of the plaintiffs. The judgment ordered essentially two basic remedies (Pet. App. D-1 *et seq.*). The first required Milwaukee to treat all sewage at all times in compliance with effluent limitations many times more stringent than those imposed pursuant to FWPCA and requiring an additional treatment process known as "advanced wastewater treatment" to be constructed and operated over and above the statutorily mandated secondary treatment.[8] The second basic remedy required Milwaukee to construct a sewage conveyance, storage and treatment facility having the capacity to "eliminate" all overflows of sewage from combined sanitary and storm sewers during periods of wet weather. The system was to be large enough to permit advanced waste treatment of water from any storm up to the size of the largest storm in Milwaukee's historical record, and to permit the treatment of any overflows which may conceivably occur from a storm larger than the largest storm in that history with "bar screens, followed by drum screens, followed by chlorination prior to discharge."

The Court of Appeals dealt with the two basic parts of the District Court judgment separately. It reversed the District Court's order insofar as it imposed effluent limitations more stringent than those required by FWPCA, which reversal eliminated the need to construct advanced waste treatment facilities required to meet the reversed effluent limitations. However, the Court of Appeals affirmed the District Court's order to the extent that the order required the "elimination" of all sewage overflows during wet weather periods on the

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[8] Generally, "advanced wastewater treatment" refers to tertiary treatment processes requiring additional capital facilities.

basis—unsupported in the record—that Milwaukee's "discharges of raw sewage . . . pose a significant risk of injury to Illinois residents. . . . no one even attempts to justify such discharges as harmless or insignificant." 599 F.2d at 177 (Pet. App. A-47). That holding left intact the need to undertake a massive construction program to build additional sewage collection, transport and treatment facilities without regard to the costs of elimination of overflows as distinguished from the control of overflows. (See discussion *infra* at 56-63).

D. Non-cost-effective Elimination of Overflows Was Ordered by the Courts Below

The concept of control of sewer overflows versus the concept of elimination of sewer overflows mandated by the courts below, reflects and describes the basic and fundamental difference between the cost-effective solution to sewer overflows enacted by Congress and the remedy ordered by the courts below. Any sewer system, including its treatment plants, has inherent storage capacity. When that capacity is exceeded, it overflows.

Any sewer system has the capacity to contain and process in the pipes, conduits, tunnels and plants which constitute the system a volume much greater than the dry-weather flow to the system. It follows that overflows occur when the system is affected by a storm event. A "controlled" sewer system is designed to contain at least the "first flush" of storm water. This means that when overflows occur in a properly "controlled" system, they occur after the system's stored pollutants have been flushed to and treated in the treatment plants of the system, and that the overflow-

ing liquids from a "controlled" system are largely storm water runoff.

Congress and the EPA, the administrative agency designated by FWPCA to administer water pollution control activities under the Act, recognize this factor in providing for "control" of sewer overflows on a cost-effective basis. In essence, the permits granted under FWPCA establish a level of protection of the nation's waters by mandating sufficient volume capacity in a "controlled" sewer system to prevent overflows until a particular magnitude of storm event occurs, usually the "six month" or "two year" storm depending on the specifics of the system and the waters into which the discharge will be made. The amount of control imposed, i.e., the storm event planned for, is related to the costs of the degree of control required to meet the water quality requirements of the receiving waters and the other circumstances of the particular system.

In contrast to the legislative "control" approach, the approach of the courts below was to *eliminate* overflows by ordering the construction of mammoth storage capacity with attendant pumping and other facilities, regardless of cost, regardless of the fact that overflows caused by storms of rare magnitude can be eliminated only at enormous cost, and regardless of any demonstrated necessity of doing so to protect public health.

Congress has recognized the law of diminishing returns, and the regulatory permit system it established provides for control of overflows from sewer systems so as to prevent the discharge of the vast majority of pollutants, while keeping costs in perspective. The courts below, however, have ignored the concepts of

cost-effectiveness in favor of total elimination without regard either to costs incurred or benefits secured.

SUMMARY OF ARGUMENT

I.

When this Court decided *Illinois* v. *Milwaukee, supra,* the federal statute dealing with water pollution was weak and ineffective. This Court therefore promulgated the federal common law of water pollution nuisance which, the Court recognized, controlled over state law and was subject to Congressional act and preemption.

Before this Court decided *Illinois* v. *Milwaukee,* Congress was addressing the same weaknesses which concerned this Court. The result was PL 92-500 (the 1972 Act), enacted only five months after the decision. The statute provides for readily enforceable effluent limitations. Administered by an expert administrative agency, the Act established an effective, comprehensive, uniform and nationwide statutory and regulatory framework for controlling water pollution resulting from "point source discharges". Under the 1972 Act, point source discharges are allowed only when made in compliance with the terms of a permit issued pursuant to the Act.

The 1972 Act was amended by PL 95-217 in 1977, which added the concept that pollution control measures should be cost-effective, i.e., the benefits achieved should justify the costs incurred. The 1977 Act also provided for extensions of time where failure to achieve mandated controls resulted from the unavailability of federal funds.

Under the 1972 Act, Illinois and Michigan had available to them a number of meaningful statutory remedies pursuant to which they could have sought all relief which they sought in the District Court. Illinois and Michigan failed to pursue and exhaust any of these remedies, and the District Court, which candidly recognized its own inability to grasp some of the testimony on the arcane subject matter involved, failed to recognize and defer to the primary jurisdiction of the expert administrative agency designated by Congress to administer the Act.

Instead, the District Court found a nuisance based solely upon the disputed opinions of expert witnesses, in the absence of *any* empirical evidence of harm to Illinois or Michigan. The District Court then imposed a mandatory injunction upon Milwaukee requiring it to *eliminate* all sewer overflows, whereas the permits issued to Milwaukee pursuant to the Act and a state court judgment enforcing such permits only require Milwaukee to *correct and control* sewer overflows.

The District Court precluded evidence dealing with practicable means of controlling sewer overflows short of complete elimination, and evidence dealing with the monumental costs of, and the lack of cost-effectiveness of, complete elimination of sewer overflows. The District Court consequently precluded any possibility of balancing the equities and hardships in formulating the terms of the mandatory injunction it granted, or of making any determination that the relief awarded was cost-effective. In affirming the District Court's order to eliminate all sewer overflows, the Court of Appeals relied in part upon the absence of the very evidence which the District Court precluded.

Congress and the Environmental Protection Agency require cost-effective "control" of sewer overflows. The amount of control imposed, i.e., the amount of capacity designed into the sewer system to prevent overflows until some particular magnitude of storm event occurs, such as the "two-year" storm, is related to the costs of achieving the degree of control required to meet water quality requirements of the receiving waters and other circumstances of the particular system. In contrast to the legislative-administrative "control" approach, the courts below ordered complete elimination, requiring the construction of mammoth storage and pumping facilities, regardless of the enormous costs involved and the greatly diminished returns of eliminating infrequent overflows caused by rare storm events, and regardless of the lack of any demonstrated necessity of doing so to protect Illinois and Michigan.

In a combined sewer system, where both sanitary sewage and storm water runoff are collected and transported in the same conduits to the treatment plant, overflows typically occur when the storage capacity of the system is exceeded during a storm event. A "controlled" sewer system is one which is designed to contain at least the "first flush" of storm water. When overflows occur in a properly "controlled" system, they occur after the system's stored pollutants have been flushed to the treatment plant, so that the overflowing liquids consist largely of storm water runoff.

A state court judgment to which Milwaukee is subject guarantees that the permit requirements to control sewer overflows will be enforced. The additional requirement to eliminate overflows, imposed by the courts below, will achieve little additional pollution

reduction, and only at an additional cost to Milwaukee of hundreds of millions of dollars. Most of the major cities of this country are plagued with sewer overflow problems. The additional cost of eliminating (as distinguished from controlling) sewer overflows across the nation (which are permitted by Illinois and Michigan in their own jurisdictions) will be tens of billions of dollars.

Illinois' federal common law nuisance claim against Milwaukee is completely controlled by FWPCA. It is clear the 1972 Act, as amended by the 1977 Act, now constitutes the federal law applicable to interstate water pollution disputes. It provides uniformity, finality and enforceability. Uniformity is achieved through uniform limitations, standards and procedures, administered by an expert administrative agency. Finality is achieved because EPA action becomes final and uncontestable unless review is sought within 90 days. Further, compliance with the terms of a permit issued under FWPCA is deemed to be compliance with the Act. Enforceability is achieved through a number of provisions which were purposefully designed to encourage the participation of all interested persons, private individuals to states, in each stage of the regulatory process, including establishment of limitations and standards, granting of permits, and assuring compliance with the permits.

In the face of this comprehensive legislative scheme, the federal courts should have no power to substitute their own notions of what the federal law of interstate water pollution control should be on an *ad hoc,* case-by-case basis, and certainly the federal courts should not provide far-reaching injunction remedies under

the federal common law when adequate federal statutory remedies are available.

II.

Without respect to the impact of FWPCA on the federal common law of nuisance, the respondents failed to prove the existence of a nuisance. The determination of liability and the remedy to be imposed upon Milwaukee in this case was reached in the face of the following express findings by the District Court:

1. The State of Illinois could have performed studies to determine whether Milwaukee sewage effluents are sufficiently diluted by Lake Michigan or inactivated by other means so that only insignificant numbers of pathogens and other pollutants, if any, could reach Illinois waters. Illinois elected not to do so, and in so electing chose to produce less evidence than it should have.

2. There are fecal coliform counts on Illinois beaches which fail to demonstrate any pollution coming from Milwaukee.

3. There is no evidence of any outbreak of water-related diseases in Illinois.

4. There is no evidence of any present effect of Illinois discharges or, for that matter, of the effect of any other nutrient discharges on fish life in the lake.

5. There is no evidence that any specific algal problem or any specific taste and odor problem experienced by residents of Illinois or Michigan is attributable to Milwaukee sewage as opposed to

the nutrients discharged by any other point or non-point source.

6. It is impossible to measure accurately any effect on the lake caused by Milwaukee's discharges, or to measure accurately the diminution in the amount of nutrients in the lake which would result if Milwaukee discharges were altogether discontinued.

Certainly, if there were any merit to the speculated hazard, there would be *some* empirical evidence of its existence resulting from Milwaukee's discharges to Lake Michigan over a period of more than 100 years. There is nothing! No witness could place a single pathogen in Illinois or Michigan waters! Illinois relies entirely upon the disputed theories of experts. In prior cases before this Court involving alleged interstate water pollution nuisance, evidence considerably stronger than that existing in this case was found insufficient and resulted in a dismissal.

If the hazards which Illinois and Michigan allege are posed by Milwaukee's overflows were truly a concern, both Illinois and Michigan would require the elimination of all overflows in their own jurisdictions to protect their own citizens. In fact, neither Illinois nor Michigan requires the total elimination of all overflows as ordered by the courts below. The imposition of such a burden on Milwaukee at the behest of sovereign states which do not impose similar burdens on their own

citizens cannot be justified by reliance upon federal common law.

III.

The Illinois' complaint herein was served upon the petitioners pursuant to the Illinois "long-arm" statute which provides for personal jurisdiction in the event of "a tortious act within" the State of Illinois. The facts of this case clearly establish that none of the petitioners have acted in any way which would justify the conclusion that they committed a tortious act within the State of Illinois, or that they had the requisite "minimal contacts" with the State of Illinois to satisfy the constitutional prerequisite of due process of law.

IV.

The courts below erroneously relied upon the words "or in which the claim arose" in determining that venue was proper in the Northern District of Illinois "where the injury was suffered." To the contrary, the claims made against Milwaukee were "local," with the locus being their source. Further, all of the conduct complained of occurred in the Eastern District of Wisconsin. Very few of the witnesses (included respondents' witnesses) resided in the district of trial. Many of Milwaukee's witnesses and all of the petitioners reside in the Eastern District of Wisconsin, not in the Northern District of Illinois. Consequently, venue was improperly laid in the Northern District of Illinois.

ARGUMENT

I. IN PL 92-500, AS AMENDED BY PL 95-217, CONGRESS HAS MADE THE LEGISLATIVE CHOICE TO CONTROL WATER POLLUTION BY MEANS OF A COMPREHENSIVE, COST-EFFECTIVE FEDERAL SCHEME WHICH IS DEPENDENT UPON UNIFORM STANDARDS AND PROCEDURES ADMINISTERED BY AN EXPERT ADMINISTRATIVE AGENCY. IN IGNORING THE UNIFORM STATUTORY STANDARDS, PROCEDURES, AND THE COSTS OF THE REMEDY IMPOSED, THE COURTS BELOW HAVE ELEVATED FEDERAL COMMON LAW ABOVE FEDERAL STATUTORY LAW CONTROLLING INTERSTATE WASTEWATER DISCHARGES.

A. The Necessity for Federal Common Law Independent of an Ineffective Federal Statute No Longer Exists.[9]

From 1948 until 1972, when this Court decided *Illinois* v. *Milwaukee, supra,* the federal statutes dealing with water pollution control were weak and ineffective, relying basically upon state-developed ambient "water quality" standards, i.e., standards specifying

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[9] The chronological progression of key events in the legislative history of FWPCA refutes any argument that Congress intended to preserve the federal common law of nuisance as distinguished from state common law. The debates in the House and Senate and the drafting of the language of the 1972 Act, excepting only that which occurred in conference, took place prior to the Court's decision in *Illinois* v. *Milwaukee, supra,* and at a time when this Court's decision in *Ohio* v. *Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971) clearly indicated that it was *state* common law that was applicable. It was only after the legislative draftsmanship had occurred but immediately before enactment of the 1972 Act that this Court acted to fashion the *federal* common law of nuisance. Thus, this Court acted before the 1972 Act in light of the ineffective legislation then in place, while Congress, in framing the 1972 Act, acted as to its operative legislative history in the light of *Wyandotte* even though formal enactment of the 1972 Act occurred immediately after the decision in *Illinois* v. *Milwaukee, supra.* It is significant that throughout the entire legislative history there is not one single mention of the *federal* common law, not surprising in view of the historical record.

the characteristics which must be maintained in the water into which discharges are made. A conference procedure was available among representatives of the state and federal authorities to establish standards if those set by the state were unacceptably low (former Sec. 10(c)(2) (§ 1160(c) (2)). Enforcement was possible only where a discharge resulted in a reduction of water quality below the specified ambient level (former Sec. 10(c)(5) (§ 1160(c)(5)). However, federal initiative was limited to interstate pollution endangering health or welfare, and then only after a six-month wait and administrative hearing. Only if the conference and hearing stages failed to bring acceptable results could an abatement suit be brought by federal authorities (former Sec. 10(g) (§ 1160(g)). The act contained two major weaknesses: (1) the use of ambient standards rather than discharge standards, and (2) ineffective enforcement provisions. Ambient standards could be based on stated legitimate uses of water, including agricultural and industrial uses. Thus, the standards might reflect the lowest legitimate use—that quality of water necessary for industrial purposes.

Before this Court expressed its concerns about the weaknesses of the then existing federal water pollution statutes in *Illinois* v. *Milwaukee, supra,* Congress began addressing those same concerns. The result was PL 92-500 (the 1972 Act), enacted only five months after the decision, which provided an effective, comprehensive, uniform, national statutory and regulatory framework for the control of water pollution. The keystones to this framework—which controls *all* "point source discharges"—are the complementary concepts that point source discharges are *not* allowed without a permit, and that discharges made in compliance with

the terms of a permit *are* allowed. (Sec. 301 *et seq.* (§ 1311 *et seq.*)). For a general discussion of the terms of the 1972 Act, see *Environmental Protection Agency* v. *California,* 426 U.S. 200 (1976).

The applicability and viability of the federal common law of water pollution nuisance, fashioned by this Court in response to the inadequacies of the old statute, must now be reviewed in light of the subsequently enacted 1972 and 1977 Acts.

The Supreme Court's landmark decision *Erie R. Co.* v. *Tompkins,* 304 U.S. 64, 78 (1938), held that there is "no federal general common law."

While the language appeared to be absolute, the Court's decision in *Erie* has not prevented the development by federal courts of what Judge Friendly [10] has termed a "specialized" federal common law. However, the areas in which such development has occurred since the *Erie* decision are limited to cases where there is an overriding federal interest in the need for a uniform rule of decision or where the controversy touches basic interests of federalism. For example, the Supreme Court has fashioned federal common law when it saw a need for a uniform rule with respect to commercial paper issued by the United States. *Clearfield Trust Co.* v. *United States,* 318 U.S. 363 (1943). The Court has fashioned federal common law when presented with issues left unanswered by a federal statutory scheme and the application of divergent state laws could frustrate the purposes of the statute. *Textile Workers Union of America* v. *Lincoln Mills,* 353 U.S. 448 (1957). The Court has fashioned federal common law

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[10] Friendly, *In Praise of Erie—And of the New Federal Common Law,* 39 N.Y.U.L.Rev. 383, 405 (1964).

in cases involving questions of international law where the application of varying state rules might impair the federal government's ability to exercise its power to conduct foreign affairs. *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964).[11] Most important to this case, the Court fashioned federal common law in *Illinois* v. *Milwaukee, supra,* which involved a controversy between a state and a nonresident over alleged pollution of an interstate body of water. See also *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.,* 304 U.S. 92 (1938).

Several principles are common to these post-*Erie* cases. First, federal common law is extraordinary. In *Wheeldin* v. *Wheeler,* 373 U.S. 647 (1963), Justice Douglas, the author of *Illinois* v. *Milwaukee, supra,* writing for the Supreme Court in that earlier decision, said:

> "As respects the creation by the federal courts of common-law rights, it is perhaps needless to state that we are not in the free-wheeling days antedating *Erie R. Co.* v. *Tompkins* (citation omitted). The instances where we have created federal common law are few and restricted." (Citing *Clearfield* and *Lincoln Mills* as examples), 373 U.S. at 651.

Second, like the common law of the states, federal common law is a law of first resort, subject to revision by subsequent legislation. Monaghan, *The Supreme Court, 1974 Term, Foreward: Constitutional Common Law,* 89 Harv.L.Rev. 1, 10-11 (1975). Finally, the

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[11] See, *generally,* Monaghan, *The Supreme Court, 1974 Term, Foreword: Constitutional Common Law,* 89 Harv.L.Rev. 1 (1975); Note, *Federal Common Law and Interstate Pollution,* 85 Harv.L. Rev. 1439 (1972).

federal common law that has emerged since *Erie* effects a complete ouster of state law in the area. Where federal concerns mandate the application of federal common law, that law preempts all state law, including state statutes, constitutions and judicial decisions, *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co., supra,* and the federal common law governs the issue whether it is raised in federal or state court. See Note, *Federal Common Law and Interstate Pollution,* 85 Harv.L.Rev. 1439, 1444 (1972).

The Supreme Court's decision in *Illinois* v. *Milwaukee, supra,* written by Justice Douglas, acknowledges these principles. The Court first established its then perceived need to carve an exception to *Erie.* The Court noted the need for uniformity, 406 U.S. at 105 n.6 and 107 n.9 (Pet. App. I-14 n.6 and 16 n.9), citing *Clearfield Trust, supra,* and *Texas* v. *Pankey,* 441 F.2d 236 (5th Cir. 1971); it noted that the then existing federal statutory scheme with respect to water pollution did not provide an adequate remedy for protection of *quasi*-sovereign interests, 406 U.S. at 102-103 (Pet. App. I-11 and 12), citing *Lincoln Mills, supra;* it noted the need to provide the states with an appropriate forum to peacefully resolve controversies involving *quasi*-sovereign interests which, had there not been a federal union, would in all likelihood have resulted in the use of force, 406 U.S. at 104 and 107 (Pet. App. I-13 and 16), citing *Missouri* v. *Illinois,* 200 U.S. 496 (1906); and the Court determined that federal common law, not state law, would control, thus preempting state statutory, constitutional and judicial law. See 406 U.S. at 102, 103 n.5 and 107 (Pet. App. I-11, 12 n.5 and 16).

However, the Supreme Court did not stop its analysis here. It went on to recognize that the federal common law it envisioned was subject to the legislative supremacy of Congress; that the Congress had the power to supplant judge-made federal common law through statute or regulation. The Court said:

> "It may happen that new federal laws and new federal regulations may in time pre-empt the field of federal common law of nuisance." 406 U.S. at 107 (Pet. App. I-16).

The quotation describes completely where this precise matter stood when the plaintiffs commenced their action. The Supreme Court had made all of the foregoing observations, many of them in *Illinois* v. *Milwaukee, supra,* but a most important change occurred when, five months later, Congress passed the Act. The very essence of that legislation was to provide a nationwide, uniform, comprehensive statutory scheme for preventing pollution of interstate waters, administered by an expert administrative agency having national interests and national priorities as its prime objective. The national interests overrode the parochial interests of the various states, but provision was made for the participation of all interested parties, including the states, to effectively voice their positions at both the administrative and judicial level.

The concern of the Supreme Court in *Illinois* v. *Milwaukee, supra*—that the states were without an effective remedy to deal with interstate water pollution —has been erased by the basic procedures and remedies created and made available to all interested parties, including states, by the 1972 Act. These insure participation in and an opportunity to be heard regarding estab-

lishment and enforcement of pollution control standards and limitations for interstate waters.

Analysis of the Act will show that Illinois and Michigan had open to them a number of remedies under the Act which equate precisely with the remedies sought in this action. First, they could have established more stringent water quality standards for their portion of Lake Michigan and recommended that Wisconsin impose more stringent effluent limitations in the Milwaukee permit, asserting that such limitations were necessary to meet or implement the Illinois and Michigan standards. Sec. 301(b)(1)(C) (§ 1311(b)(1)(C)), Sec. 303(c) (§ 1313(c)), Sec. 402(b)(5) (§ 1342(b)(5)). Second, they could have urged Wisconsin to establish more stringent water quality standards for the Wisconsin portion of Lake Michigan, either initially or during Wisconsin's periodic review of its standards, asserting a need to protect the public health and welfare or to avoid violation of Illinois' and Michigan's standards. Secs. 303(c)(1) and (2) (§ 1312(c)(1) and (2)), and 40 C.F.R. § 130.17(c)(4). Third, they could have requested and participated in public hearings on Milwaukee's permit applications and urged imposition of more stringent limitations to meet requirements of Illinois or Michigan water quality standards or other Illinois or Michigan law. Sec. 402(b)(3) (§ 1342(b)(3)) and Sec. 301(b)(1)(C) (§ 1311(b)(1)(C)). Fourth, they could have submitted written recommendations to Wisconsin with respect to Milwaukee's permit applications, and, if any part of their recommendations were not accepted, they could have requested the Administrator to veto Wisconsin's issuance of the permits and, if necessary, formulate the terms of an acceptable permit. Sec. 402(b(5) (§ 1342(b)(5)) and Sec.

402(d)(2)(A) (§ 1342(d)(2)(A)). Fifth, they could have requested the Administrator to promulgate water quality related effluent limitations under Section 302 (a) (§ 1312) for sewerage systems discharging into Lake Michigan, asserting that the existing effluent limitations would interfere with the attainment or maintenance of that water quality which assures protection of public water supplies, recreational activities and other legitimate uses. Hearings are provided for therein so that all affected parties may be heard. Finally, if Illinois or Michigan were dissatisfied with the results of any of these administrative procedures, they could have sought judicial review. Section 509(b)(1) (§ 1369) provides that any interested person may obtain a review of the Administrator's action: (1) in promulgating any effluent standard or treatment standard under Sec. 301 or 307 (§§ 1311, 1317) of the Act, or any standard or performance under Sec. 306 (§ 1316); (2) in making any determination with respect to a state permit program under Sec. 402(b) (§ 1342(b)); or (3) in issuing or denying a permit under Sec. 402 (§ 1342). Significantly, they chose to ignore each and every one of those courses open to them under the statute. There has been no pursuit of the administrative remedies! *See generally, McKart* v. *United States,* 395 U.S. 185, 194-195 (1969).

B. FWPCA Is Comprehensive, Effective and Complete. It Replaces the Former Federal Statutes Found to Be Ineffective.

It is clear that the 1972 and 1977 Acts constitute the federal law applicable to pollution of interstate waters. This legislation, enacted after this Court's decision in *Illinois* v. *Milwaukee, supra,* completely meets the concern of this Court that federal statutory law prior to

the 1972 Act failed to provide an adequate and effective basis for the resolution of interstate disputes. The essence of this legislation was to provide a comprehensive, uniform, nationwide statutory scheme for controlling pollution of interstate waters, administered by an expert administrative agency having national interests and priorities as its prime objective rather than parochial interests of the various states, but providing for the participation of all interested parties, including the states, at both the administrative and judicial levels.

As previously pointed out, in *Illinois* v. *Milwaukee, supra,* this Court said:

> "It may happen that *new federal laws* and new federal regulations *may in time pre-empt* the field of *federal common law* of nuisance." 406 U.S. at 107 (Pet. App. I-16) (emphasis added).

At that time, federal legislation attempted to deal with the subject matter of water resources by specifying water quality criteria for the receiving water. The water quality criteria approach was a total failure from the standpoint of administration and results. However, five months after the complaint herein was filed, Congress acted to preserve the nation's water resources by totally revamping the pertinent federal statutory framework so as to control the discharge of pollutants. Congress required *every* "point source" of wastewater discharge to be the subject of a federally authorized and supervised permit, issued under federal supervision by experts after public hearings, with all affected parties—including neighboring states—having the right to be heard and to be protected.

It is equally significant that within two months after the trial court decision, Congress refined its 1972 legis-

lation, making explicit statutory pronouncements on the importance of fiscal considerations. It requires *cost-effective* solutions to the problems of water pollution, clarifying national *goals* in the context of *federal funding* (Sec. 217 (§ 1297) of FWPCA).

(1) *Congress Chose Administrative Uniformity as the Federal Approach to Water Pollution Control.*

Congress, of course, had the power to choose among specific means to control the pollution of this nation's waters. The choices were many. Congress could have left full responsibility with the individual states. It could have designated the courts as the vehicle to establish and define the required standards of conduct on a case-by-case basis. Its choice, however, was the legislative-administrative partnership, with Congress supplying the objectives and general guidelines and an expert administrative agency making specific decisions regarding implementation.

Then Senator, now Secretary, Muskie viewed the problem as follows:

> "Senators will recall from the November debate on the Senate bill that there are three essential elements to it: Uniformity, finality, and enforceability. Without these elements a new law would not constitute any improvement on the old: We would not bring a conference agreement to the floor without them." *Legislative History* at p. 162.[12]

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[12] All citations to the legislative history are to "A Legislative History of the Water Pollution Control Act Amendments of 1972," prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress (Committee Print 1973).

Thus, at the outset Congress recognized that the achievement of a "national" goal required the application of national, uniform standards of conduct, while at the same time recognizing the need for a uniform procedure for the establishment of more stringent standards when required. Uniformity of approach and administration had to be a keystone. Without nationally mandated uniformity, the parochial interests of the various states and their branches of government stood in the way of achieving the national objective. The legislative history of the 1972 Act makes this clear. For example, the Conference Report on the 1972 Act states:

> "Except as provided in section 301(c) [§ 1311 (c)] of this Act, [economic based variance from 1983 standard for industrial point source] the intent of the Conferees is that effluent limitations applicable to individual point sources within a given category or class be as uniform as possible. The Administrator is expected to be precise in his guidelines under subsection (b) of this section, so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations." *Legislative History* at 309.

The courts have acknowledged this Congressional mandate for uniformity. In *Natural Resources Defense Council, Inc.* v. *Train,* 510 F.2d 692, 711 (D.C. Cir. 1975), the court said:

> "The decentralization of permit issuing authority envisioned by section 402 [§ 1342] prompted concerns that industrial threats to relocate in areas where pollution controls were less restrictive would coerce states into adopting lax permit require-

> ments. The effluent limitation guidelines contained in section 304(b) [§ 1314(b)] and the corresponding effluent limitations to be promulgated under section 301(b) [§ 1311(c)] were intended to safeguard against industrial pressures by establishing a uniform 'minimal level of control imposed on all sources within a category or class.' Senator Muskie emphasized the function of the guidelines in promoting uniformity. He states that '[t]he Administrator is expected to be precise in his guidelines so as to assure that similar point sources with similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations.' "

The Court of Appeals for the District of Columbia reiterated this concept in *Natural Resources Defense Council, Inc.* v. *Costle,* 568 F.2d 1369, 1978 (D.C. Cir. 1977):

> "As noted in *NRDC* v. *Train,* the primary purpose of the effluent limitations and guidelines was to provide uniformity among the federal and state jurisdictions enforcing the NPDES program and prevent the 'Tragedy of the Commons'[13] that might result if jurisdictions can compete for industry and development by providing more liberal limitations than their neighboring states. 510 F.2d at 709."

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[13] The court explained this term in footnote 19 of its opinion, 568 F.2d at 1378:

> "The classic account of the Tragedy of the Commons can be found in Hardin, *The Tragedy of the Commons,* 162 Science 1243 (1968). Hardin makes the point in the context of sheepgrazing. Put simply, even over-simply, Hardin shows that if no one is authorized to set limits to preserve open pasture land as a whole, allowing sheep to graze on that land may lead to serious overgrazing, as each herdsman thinks only of his own advantage. The solution lies in some mandate, from above or by agreement, with sanctions to compel conformance."

The result is the same whether the disparity is achieved by adopting liberal limitations in one's own state or by seeking to impose unrealistically strict limitations on a neighboring state.

Even the trial court in the present case, *while enforcing different standards on different defendants depending on whether they settled or tried the case,* including providing that the requirements imposed on the settling defendants were made dependent on federal funding, purported to recognize the need for uniformity:

> "We cannot have one law for Milwaukee and another law for Waukegan, the North Shore Sanitary District, Gary and Muskegon. The law must be uniform, especially since we are dealing with the federal common law of nuisance, which the United States Supreme Court has said is peculiarly adaptable for use in the solution of interstate water problems." (Pet. App. F-21).

See also: *E. I. duPont de Nemours & Co.* v. *Train,* 430 U.S. 112, 138 (1977).

The uniformity envisioned by the Act is achieved through delegation of specific decision-making to an expert administrative agency. Decisions involving control of water pollution require unique expertise, scientific knowledge and resources. Many courts have acknowledged that the EPA has this "unique experience and expertise" E.g., *American Meat Institute* v. *EPA,* 526 F.2d 442, 450 n.16 (7th Cir. 1975). The trial court in the present case forthrightly acknowledged that it did not possess such experience and expertise, and noted the difficulty of making the required decisions without it:

> "The nature of the subject matter here, however, is such that my own experience and observation in

> life are relatively little use to me. It is well known to all of us that the arcane subject matter of some of the expert testimony in this case was sometimes over the heads of all of us to one height or another. I would be certainly less than candid if I did not acknowledge that my grasp of some of the testimony was less complete than I would like it to be, but short of enrolling in a university course directed toward a reorientation of my entire education and spending the years that that would involve, I know of no remedy for the problem." (Pet. App. F-3 and 4.)

Congress envisioned the difficulty that courts would experience if presented with the necessity of making specific decisions implementing national policy in an area of specialized scientific knowledge. Thus, the Senate Report comments on Sec. 505 of the 1972 Act (§ 1365) (authorizing citizens' suits) as follows: [14]

> "*Section 505 would not substitute a 'common law' or court developed definition of water quality.* An alleged violation of an effluent control limitation or standard, would not require reanalysis of technological in [sic] other considerations at the enforcement stage. These matters will have been settled in the administrative procedure leading to the establishment of such effluent control provision." *Legislative History* at 1497 (emphasis added).

As Milwaukee argued to the Court of Appeals, while the District Court knew "of no remedy for the problem" (of the courts', and particularly the District Court's, inadequate technical experience and knowl-

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[14] The Conference Committee, comprised of Senate and House members, adopted Section 505 of S.2770 with minor revisions not relevant here.

edge), Congress obviously did. As Milwaukee said below, the District Court failed to defer to the expert administrative agency in the type of situation where this Court has, and the District Court should have, applied the doctrine of primary jurisdiction:

> "[I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. . . . Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.
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> It is significant that this mode of accommodating the complementary roles of courts and administrative agencies in the enforcement of law was originally applied in a situation where the face of the statute gave the Interstate Commerce Commission and the courts concurrent jurisdiction." *Far East Conference* v. *United States,* 342 U.S. 570, 574-575 (1952).
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> "In every case the question is whether the reasons for the existence of the [primary jurisdiction] doctrine are present and whether the purposes it services will be aided by its application in the particular litigation. These reasons and purposes have often been given expression by this court. In the earlier cases emphasis was laid on the desirable uniformity which would obtain if initially a specialized agency passed on certain types of administrative questions. See *Texas & Pacific R. Co.* v. *Abilene Cotton Oil Co.,* 204 U.S.

426, 51 L.Ed. 553, 27 S.Ct. 350, 9 Ann. Cas. 1075. More recently the expert and specialized knowledge of the agencies involved has been particularly stressed. See *Far East Conference* v. *United States,* 342 U.S. 570, 96 L.Ed. 576, 72 S.Ct. 492. The two factors are part of the same principle, 'now firmly established, that in cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. This is so even though the facts after they have been appraised by specialized competence serve as a premise for legal consequences to be judicially defined. Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.' *Id.* 342 U.S. at 574, 575." *United States* v. *Western R. R. Co.,* 352 U.S. 59, 64-65 (1956).[15]

(2) *Congress Gave Finality to the Administrative Uniformity It Chose.*

The second essential element of the 1972 Act, as stated by Senator Muskie, is "finality." Finality is achieved by the interaction of two concepts.

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[15] Note that here Illinois had the right to proceed administratively to seek the same relief it sought in court, a factor which the dissent thought important in *Ricci* v. *Chicago Mercantile Exchange,* 409 U.S. 289, 309-319 1973), a case in which the doctrine of primary jurisdiction was applied by the Court even though such rights were arguably not present.

The first concept resulting in finality is that EPA action is final. EPA action becomes final and incontestable unless review is sought within 90 days in a Circuit Court of Appeals and, if reviewed, becomes final upon completion of review. Section 509(b)(2) (§ 1369(b)(2)) of FWPCA provides:

> "Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection [appeal to Circuit Court of Appeals within 90 days] shall not be subject to judicial review in any civil or criminal proceeding for enforcement."

The second concept to achieve finality is embodied in Sec. 402(k) (§ 1342(k)) which establishes that compliance with a permit shall be deemed compliance with the Act. Section 402(k) (§ 1342(k)) provides:

> "Compliance with a permit issued pursuant to this section shall be deemed compliance for purposes of sections 309 and 505 [§§ 1319, 1365], with sections 301, 302, 306, 307, and 403 [§§ 1311, 1312, 1316 and 1343], except any standard imposed under section 307 for a toxic pollutant injurious to human health. . . ."

In *E. I. duPont de Nemours & Co.* v. *Train,* 430 U.S. 112, 138 n.28, (1977), the Supreme Court said:

> "The purpose of [Sec.]402(k) [§ 1342(k)] seems to be to insulate permit holders from changes in various regulations during the period of a permit and to relieve them of having to litigate in an enforcement action the question whether their permits are sufficiently strict. *In short,* [*Sec.*] *402(k) serves the purpose of giving permits finality.*" (emphasis added).

(3) *The Finality Enacted by Congress Is Essential to Timely Attainment of Pollution Control.*

These two concepts result in the "finality" sought by Congress. They provide the assurances that are necessary to cause dischargers to spend the billions of federal, local and private dollars required to control water pollution. Without such finality no discharger can be sure what the applicable standard will be. Only an administratively established standard can tell the discharger the precise level of control to be achieved. Practical and economic reality dictates that dischargers will not spend the substantial sums required until the precise levels that must be achieved are fixed and final. If a discharger remains subject to suit under the *Illinois* v. *Milwaukee* decision as applied by the District Court, all that is known is that the result is subject to "no fixed rules" and the "informed judgment of the chancellor," *Illinois* v. *Milwaukee, supra,* at 107-108 (Pet. App. I-16 and 17). This is hardly the stuff from which finality arises. See Zener, "The Federal Law of Water Pollution Control," *Federal Environmental Law,* 787-790 (E. Dolgin and T. Guilbert, ed. 1974) (chapter authored by Robert Zener, former General Counsel of the EPA).

(4) *The Administrative Uniformity Is Universally Enforceable by All Interested Parties at All Stages.*

Senator Muskie's characterization of the third essential element of the 1972 Act is "enforceability." A review of the statute quickly discloses that the enforcement provisions are not only pervasive, they are purposely designed to encourage the participation of all interested persons—governmental bodies and citizens alike—in the overall process, from establishment of

standards, to granting of permits, to assuring compliance.

The EPA's enforcement authority is set forth in Sec. 309 (§ 1319) of the Act and includes provisions for civil and criminal proceedings. Section 505 (§ 1365) provides for citizen suits, with the respective states acting on behalf of their citizens, and empowers state governors to enforce the Act. The states are also given express authority to challenge the action of the EPA in promulgating any effluent standards, limitations or regulations by appeal to the federal Courts of Appeals, Sec. 509 (§ 1369), and to participate in the permit proceedings, Sec. 402 (§ 1342). This participation includes the right to receive notice of the proceedings, the right to appear and be heard, the right to apply to the Administrator to exercise his discretion to veto the issuance of any permit, and finally the right to judicially challenge the issuance of any permit.

C. The Federal Statute Controls the Former Federal Common Law.

The Supreme Court has recognized that *federal legislation* on the subject of interstate waters *establishes the federal law in place of previously applicable federal common law* principles. *Arizona* v. *California,* 373 U.S. 546 (1963), cited by *Illinois* v. *Milwaukee, supra* at 106 (Pet. App. I-15). The *Arizona* case dealt with the allocation of water in the Colorado River between the various states that border that river. Congress had passed a statute providing a method and formula for the allocation of those waters. The State of California argued that apportionment of the water in the Colorado River should be controlled by the common law doctrine of equitable apportionment, which the Supreme Court had applied in earlier cases between vari-

ous States of the Union. The Supreme Court rejected the State of California's argument, noting that a federal statute was involved, and said:

> "It is true that the Court has used the doctrine of equitable apportionment to decide river controversies between states. But in those cases Congress had not made any statutory apportionment. In this case, we have decided that Congress has provided its own method for allocating among the lower Basin states the mainstream water to which they are entitled under the Compact. *Where Congress has so exercised its constitutional power over waters, courts have no power to substitute their own notions of an 'equitable apportionment' for the apportionment chosen by Congress.*" 373 U.S. at 565 (emphasis added).

Once Congress acts to provide uniform federal rules and meaningful remedies, the manner in which the basic interests of the nation are to be attained is defined. The federal courts thereafter should be limited to carrying out the congressional mandate; if they retain any "common law" jurisdiction at all the exercise of that jurisdiction should be limited to the cost-effective control of point source discharges legislated by Congress, just as the common law jurisdiction in apportionment cases became jurisdiction to carry out the congressionally mandated apportionment. With the definitive legislative action of Congress, the sole branch of government in which all states are represented, the federal common law does not remain subject to "no fixed rules" and the "informed judgment of the chancellor," *Illinois* v. *Milwaukee, supra* at 107-108 (Pet. App. I-16 and 17). "Catch as catch can" rules established on a case-by-case basis by federal courts are no longer necessary or tolerable. The basic interests of

federalism demand that independent judicial approaches to a "federal common law" must give way.

D. The Control of FWPCA Has Been Recognized by Other Courts and Legal Scholars.

The rationale for the conclusion that the federal statute controls the federal common law is aptly stated as follows in Stewart, *Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy,* 86 Yale L.J. 1196, 1228-1230 (1977):

> "Congressional control of interstate spillovers is supported by a final consideration: the inherent power of Congress to take measures reasonably necessary for preserving the system of union. Spillovers have and will continue to create tensions among the states. As economic development proceeds and populations grow, interstate pollution will increase, and with it the potential for retaliatory tactics and litigation. Congressional power to mitigate these tensions through preventive legislation is implicit in the very decision to replace a loose confederation hamstrung by interstate friction with a strong national government.
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> * * *
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> Because of political and administrative constraints, Congress must often deal with spillover problems in a generic fashion. A case-by-case judicial determination of whether federal statutory impositions on states were warranted in particular instances would, in effect, make the judge-made common law of interstate pollution superior to congressional statute."

In Zener, "The Federal Law of Water Pollution Control," in *Federal Environmental Law, supra,* the

former General Counsel of the EPA states at page 790:

> "Finally, whatever limited importance the federal common law might have as a tool for the regulation of water pollution will tend to recede as the FWPCA Amendments of 1972 are implemented and detailed, numerical standards are established for the major categories of waste dischargers. In *Illinois* v. *Milwaukee,* the Court stated that '[w]hile the various federal environmental protection statutes will not necessarily mark the outer bounds of the federal common law, they may provide useful guidelines in fashioning such rules of decision.' This formulation was obviously intended to give the Court some leeway in deciding whether to follow the rules contained in the FWPCA. However, since the decision, the 1972 Amendments have established a much more comprehensive regulatory scheme than had previously existed. If, under that scheme a discharger is governed by an administratively established effluent limitation embodied in a federal permit, it seems doubtful that a federal court would intervene under the auspices of federal common law to impose a different standard on the discharger." [16]

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[16] The author's footnote at this point states:

"Indeed, such intervention might be precluded by § 509(b)(2) of the FWPCA, 33 U.S.C. § 1369(b)(2) which provides:

> 'Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection [this includes the issuance of a discharge permit] shall not be subject to judicial review in any civil or criminal proceeding for enforcement.'

It should also be noted that § 401 of the FWPCA, 33 U.S.C.A. § 1341, establishes an administrative mechanism for resolution of interstate pollution disputes, under which a state may object to the issuance of a federal permit for a discharge in another state that affects the waters of the objecting state."

Similarly, Professor Grad in *Treatise on Environmental Law* (Matthew Bender, 1979), which followed the passage of the 1972 Act, makes the following statement regarding the status of the federal common law of nuisance in light of that statute:

> "The development of a federal common law of public nuisance—limited, hopefully, to actions between states—was probably a response to the inadequacies of past federal regulatory enactments in the air and water pollution control field. The law of nuisance has been far from clear in its application to modern water pollution and air pollution situations. It is in response to the inadequacies and lack of standards of the law of nuisance that much environmental regulatory legislation has been developed. The development of a federal common law of nuisance seems both unnecessary and unwarranted in the light of recent federal standards and federal enforcement sanctions provided under appropriate legislation. It may be useful to point out that the assertion of a federal law of nuisance in the *Illinois* v. *City of Milwaukee* case is clearly dictum. It is to be hoped that this peculiar and unnecessary departure from legislatively determined standards in the field will not see any further development. Indeed, perhaps the time has already come that federal regulations 'pre-empt the field of federal common law of nuisance,' as predicted by Mr. Justice Douglas." Grad, *supra* at § 3.03, Vol. I, p. 3-180.

As Milwaukee argued below, this is not a case involving the issue of federal preemption of state law. Here, we deal with "preemption" in the context of *federal statutory law* enacted by the national representative legislative body having acknowledged supremacy, *binding* the federal courts which apply *federal law*.

Thus, it is really a question of semantics whether one refers to the federal common law of nuisance being controlled by the statutory and regulatory body of law, or whether one states that the federal common law of nuisance has been "preempted" by federal legislation. Where one deals with a single sovereign, the federal governing entity, what is relevant is the completeness and controlling character of the statutory and regulaotry body of law.

By the passage of FWPCA, Congress has provided a statutory method for controlling water pollution which includes: (1) a comprehensive legislative framework establishing a uniform, nationwide system for the determination of effluent standards and limitations; (2) delegation of authority to establish the specific and detailed standards to an administrative agency having the knowledge, experience and resources to carry out the legislative objectives; and (3) creation of a system, in cooperation with the various states, to enforce the standards and limitations by means of a permit system, including an opportunity for all interested persons to participate in the establishment of the standards and limitations, followed by the granting of the permits and subsequent enforcement of restrictions imposed upon the permittees by the statute, the regulations and the permits themselves, with several points at which judicial review is available. In the face of this legislative scheme, the various federal courts should have no power to substitute for the federal law enacted by Congress their own respective notions of the federal law of interstate water pollution on an *ad hoc,* case-by-case basis.

This same rationale was expressed by the Court of Appeals for the Fourth Circuit in *Committee for the*

Consideration of the Jones Falls Sewage System v. *Train,* 539 F.2d 1006 (4th Cir. 1976). That court said:

> "To the extent there is a federal interest, it is expressed in the Federal Water Pollution Control Act Amendments of 1972, but the plaintiffs have no claim based upon the statute.
>
> *Indeed it would be an anomaly to hold that there was a body of federal common law which proscribes conduct which the 1972 Act of Congress legitimates.* The defendants are in compliance with the statute. They are operating under a permit issued in accordance with the statute and the authorization of the Environmental Protection Agency. The Congress and the Executive Department, acting through the Environmental Protection Agency, have declared their conduct lawful until the time for the application of more restrictive standards. While the state courts are free to apply state nuisance law more rigidly, a federal court in such a local controversy may not turn to a supposed body of federal common law to impose stricter standards than the statute provides." 539 F.2d at 1009 (emphasis added).

This same analysis was adopted in *New England Legal Foundation* v. *Costle,* 475 F.Supp. 425 (D.C. Conn. 1979). There Circuit Judge Newman, United States Court of Appeals for the Second Circuit, sitting by designation, dismissed a claim alleging a federal common law nuisance for failure to state a claim upon which relief can be granted. The claim alleged that the defendant maintained a federal common law nuisance by burning oil containing sulfur in excess of limitations established for sulfur content under the federal Clean Air Act and by the State of Connecticut. The court noted, however, that the defendant's action was au-

thorized by a variance approved in accordance with the federal statute. The court held:

> "This Court will not devise an equitable remedy to proscribe the very conduct that the EPA, acting in its regulatory capacity pursuant to statutory mandate, has specifically legitimated. While it is conceivable that the Connecticut state courts may apply state nuisance law more rigidly, this Court will not 'turn to a supposed body of federal common law to impose stricter standards than the statute provides.' *Committee for Jones Falls Sewage System* v. *Train,* 539 F.2d 1006, 1009 (4th Cir. 1976)." 475 F.Supp. at 441-442.

The court reasoned that since the purpose of the equitable relief sought under the federal common law was to vitiate the effect of the EPA's determination to permit the activity which created the alleged nuisance, and since the federal Clean Air Act provided a specific statutory remedy to challenge this action of the EPA, the court would not create a common law remedy to accomplish what a successful proceeding under the statute would achieve. The court said:

> "The relief sought by plaintiffs' action would have a substantial impact upon the implementation of a specific agency determination. Plaintiffs' claim against LILCO's conduct as a federal common law nuisance is, in effect, an attack upon the validity of the EPA-approved variance. It is mere sophistry to argue that a challenge to LILCO's operation in compliance with the special limitation is not a challenge to the legality of the limitation itself. . . .
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> * * *
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> Since the ultimate purpose of any equitable relief against LILCO is to vitiate the effect of the special limitation, this Court will not create a common law remedy to accomplish that which a suc-

cessful § 7426 petition would achieve." 475 F.Supp. at 441 n.21.[17]

This same reasoning is applicable in this case. The remedy imposed by the courts below vitiates the permits issued to Milwaukee under FWPCA. Since FWPCA provides specific remedies to the complaining states which, if successful, could achieve the desired result, the federal courts should not provide federal common law injunctive remedies when adequate federal statutory remedies are available.[18]

The operative language of FWPCA supports this position. To cause the expeditious and efficient expenditure of the billions of federal, state, local and private dollars required to abate water pollution, dischargers must be assured as to what the applicable standards are. Practical and economic reality dictates that dischargers required to expend huge sums of public funds know that the applicable standards are fixed and final. See discussion *supra* at 43-45.

If a discharger remains subject to suit under the "federal common law" as applied by the courts below, and subject to an *ad hoc* remedy determination by a federal court without respect to the standards under the federal statutory law, it would ill behoove any municipality or other governmental agency to move forward in an expeditious manner. Rather, it would place

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[17] On May 20, 1980, in an as yet unpublished opinion, the U.S. Court of Appeals for the Second Circuit decided the appeal in *New England Legal Foundation* v. *Costle, supra*. With respect to the trial court's dismissal of the federal common law claim against LILCO, the Court of Appeals reversed decision pending this Court's determination of this case, retaining jurisdiction to deal with this issue on the basis of supplemental briefs if necessary.

[18] *See, e.g., Reisman* v. *Caplin*, 375 U.S. 440 (1964).

a premium on delay, so as to permit all forums having possible jurisdiction to speak and thus prevent false starts in these monumentally expensive public projects with attendant waste of public funds.

E. Congress Provided That Compliance With Permits Issued Under the Congressionally Established Administrative Procedures Is Compliance With Federal Law.

Section 505 (§ 1365) is the provision of the Act providing for citizen suits. Subsection (e) thereof states:

> "(e) nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or seek any other relief (including relief agaist the Administrator of a State agency)."

Since compliance with a permit is specifically defined by Sec. 402(k) (§ 1342(k)) as compliance with Sec. 505 (§ 1365), and since common law actions are provided for in Sec. 505, it follows that the standards and limitations under Secs. 301, 302, 306, 307, and 403 (§§ 1311, 1312, 1316, 1317 and 1343) are the discharge limitations to which a discharger may be held under common law or in the federal statutory scheme.[19] Thus, the language of the 1972 Act requires the conclusion

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[19] Section 301 (§ 1311) sets forth certain effluent limitations and gives the Administrator of the EPA authority to define additional effluent limitations. Section 302 (§ 1312) authorizes the Administrator to establish stricter limitations than are found in Section 301. Section 306 (§ 1316) authorizes the Administrator to set national standards of performance. Section 307 (§ 1317) authorizes the Administrator to establish toxic and pretreatment effluent standards. Section 403 (§ 1343) concerns ocean discharge criteria.

that the federal common law of interstate water pollution is governed by permit limitations in those instances in which the harm complained of is the subject of a permit issued pursuant to the Act.

F. The Decisions Below Are an Attempt to Raise Federal Common Law Above the Paramount Federal Statutes.

In the face of the congressional enactments, the decisions below are a judicial foray into the political field of resource allocation in environmental management of the nation's interstate water resources requiring expenditures of municipal, state and federal funds of staggering magnitude. One of the basic characteristics of the congressional mandate in FWPCA is that costs and the availability of federal funds to localities and states providing interstate water protection are important factors in pollution control determinations. Nevertheless, costs and the availability of federal funds were not only ignored below, they were expressly declared by the District Court to be of no interest to the decisional rationale.

The decisions below considered federal legislation as a parallel course for dealing with water pollution which was of passing, but not controlling, interest to the totally independent approach by the courts under the federal common law. This approach failed to accord any weight to the congressional provision for participation of affected municipalities and states in an expert administrative forum, while expressing the trier of fact's own lack of expertise in the area. In this setting, both the District Court and the Court of Appeals held the "federal common law" to be wholly distinct from, and independent of, the federal statutory scheme

for controlling the identical subject matter, namely point source discharges to the nation's waters.[20]

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[20] Various lower federal courts have considered the effect of the enactment of the 1972 Act and the 1977 Act on this Court's opinion in *Illinois* v. *Milwaukee, supra* at 107 (Pet. App. I-16). In certain instances the courts have found it unnecessary to deal with the issue: *Reserve Mining Co.* v. *Environmental Protection Agency,* 514 F.2d 492, 532 (8th Cir. 1975) ["[W]e deem it unnecessary and, indeed, unwise to also rely on federal nuisance law."]; *Township of Long Beach* v. *City of New York,* 445 F.Supp. 1203, 1215 (D.N.J. 1978), ["I will therefore deny the motion to dismiss based on preemption without prejudice to a renewal thereof after further clarification of the nature of this suit, the new regulations and their effect on the preemption issue"]; *Stream Pollution Control Bd.* v. *United States Steel Corp.,* 512 F.2d 1036 (7th Cir. 1975) [unnecessary to decide]. In other instances the courts have concluded that the Acts control, at least with respect to federal common law nuisance claims challenging activities expressly permitted by the federal statutory scheme: *Committee for the Consideration of the Jones Falls Sewage System* v. *Train,* 539 F.2d 1006, 1009 (4th Cir. 1976) ["[I]t would be an anomaly to hold that there was a body of federal common law which proscribes conduct which the 1972 Act of Congress legitimates"]; *cf., New England Legal Foundation* v. *Costle,* 475 F.Supp. 425, 441-442 (D.C. Conn. 1979) *aff'd* in part, held in abeyance in part, —— F.2d —— (2d Cir. May 20, 1980) [in context of Clean Air Act, 42 U.S.C. § 7401 *et seq.,* court may not "turn to a supposed body of federal common law to impose stricter standards than the statute provides," relying on *Committee for the Consideration of the Jones Falls Sewage System, supra*]. Other cases preceeded promulgation of the EPA's regulations under the 1972 Act: *United States* v. *United States Steel Corp.,* 356 F.Supp. 556 (N.D. Ill. 1973) ["At least until the Environmental Protection Agency has acted effectively, the hands of the plaintiff governments are not tied."]; *United States* v. *Ira S. Bushey & Sons, Inc.,* 363 F.Supp. 110, 119-120 (D. Vt. 1973), aff'd. mem. 487 F.2d 1393 (2d Cir. 1973), cert. denied, 417 U.S. 976 (1973) [prior to regulations]; *Illinois* v. *Milwaukee,* 366 F.Supp. 298, 299-300 (N.D. Ill. 1973) [prior to regulations]. Still other cases have determined to various degrees that the 1972 and 1977 Acts and federal regulations do not affect the federal common law of nuisance: *California Tahoe Regional Planning Agency* v. *Jennings,* 594 F.2d 181, 193 (9th Cir. 1979),

G. The Courts Below Ignored the National Character and Massive Fiscal Impact of the Problem Considered.

The courts below failed to recognize and deal with the pervasive character of the problem. The issues involved in this case are not merely directed to the resolution of an isolated situation in Milwaukee. They present a problem to this nation as a whole, a subject most recently addressed in a GAO report, *Report by the Comptroller General of the United States: Large Construction Projects to Correct Combined Sewer Overflows Are Too Costly,* CED-80-40 (December 28, 1979). There are approximately 1,300 communities in the United States, including most of the major cities, which have a total combined sewer area of 2¼ million acres, and serve a total of 38 million persons. In fact, 58 major cities such as Chicago, Detroit, New York, Cleveland, Pittsburgh, Philadelphia, San Francisco and Washington, D.C., located in 24 states, have eighty-three percent of the combined sewer area and eighty-one percent of that resident population. EPA, *Report to Congress on Control of Combined Sewer Overflow in the United States,* MCD Rpt. No. 50 (EPA's report pursuant to Sec. 516(c) of FWPCA, Oct. 1, 1978).

With respect to funding combined sewer overflow projects, after estimating national costs at $21.16 billion (1978 dollars) for *controlling* combined sewer overflows so as to permit two untreated overflow events

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cert. denied, —— U.S. —— (No. 79-15, Oct. 1, 1979) [dismissed for failure to state a claim, but stated federal common law claim not affected]; *United States* v. *Stocco Homes, Inc.*, 498 F.2d 597, 611 (3d Cir. 1974), cert. denied, 420 U.S. 927 (1975) [dicta, no preemption]; *National Sea Clammers Assoc.* v. *City of New York,* —— F.2d ——, slip opinion at Part IV, (3d Cir. Feb. 5, 1980) [no effect, relying on Court of Appeals decision in *Illinois* v. *Milwaukee, supra*].

per year rather than totally eliminating them,[21] the EPA's October 1, 1978 report to Congress states:

> "It must be remembered that any increase in spending for combined sewer overflow control needs . . . will result in a decrease in spending for all other pollution control needs . . . These trade offs must be weighted carefully for any given municipality." EPA, Report to *Congress on Control of Combined Sewer Overflow in the United States, supra* at ES-9-10.

Illustrative of the technical considerations and their impact on costs to the public is a passage from EPA, *Nationwide Evaluation of Combined Sewer Overflows and Urban Storm Water Discharges.* EPA-600/2-77-064a (Sept., 1977) at 3:

> "Analysis indicated that control of [overflows from combined sewer at the level of] the one hour, one month storm would permit capture of 90 percent of the precipitation volume. Sizing for the two year, one hour storm yields relatively little incremental control and requires a much higher [cost and] control volume."

A more specific example of the fiscal impact of dealing with combined sewer overflows and one which has direct application to this litigation is provided by a recent GAO report, *Report by the Comptroller General of the United States: Combined Sewer Flooding and Pollution—a National Problem. The Search for Solutions in Chicago,* CED-79-77 (May 15, 1979). The report considered whether a Tunnel and Reservoir Plan

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[21] *See, EPA, 1978 Needs Survey: Cost Methodology for Control of Combined Sewer Overflows and Stormwater Discharge,* EPA Rpt. No. 43019-79-003 (EPA's report to Congress pursuant to Sec. 516(b) of FWPCA, Feb. 10, 1979).

("TARP") is a cost-effective solution to Chicago's combined sewer overflows. The TARP plan is similar to the "convey, store and treat" solution ordered by the court below to solve the combined sewer overflow problems in the Milwaukee area except, as noted in the report, TARP is not intended to *eliminate* overflows; it is merely meant to *control* them. *Id.* at Vol. 1, pp. 4-5.

According to the GAO, TARP is "one of the largest" public works projects in the nation.

> "[I]ts projected costs will probably exceed the $9.2 billion expended for the Alaskan pipeline." GAO, *Report by the Comptroller General of the United States, supra* at Vol. 1, p. 1.
>
> * * *
>
> "Determining the precise cost for TARP and the associated projects is difficult. However, it will be expensive—$4 billion to $8 billion (December 1977 estimates) depending on what estimates are used and which associated projects are included in the total. If history is any indication, costs will continue to escalate and could exceed $11 billion by 1983." *Id.* at Vol. 1, p. 4.

In summary, the GAO report says that when TARP is judged by what it will cost, the taxpayers "must stop and think."

> "In February 1979, EPA estimated that it would take more than $25 billion just to solve the pollution problems of combined sewer communities. If the cost of solving flooding problems associated with combined sewers is included, it could ultimately run more than $100 billion. Thus, the time may have come to reexamine the project." *Id.* at Vol. 1, pp. 34-37.

It is in this setting, where the technical problems are only beginning to be known, where means to control the problem have monumental fiscal implications, and where major segments of the country and vast numbers of its population are affected, that the courts below have acted. With respect to the evidence relating to Milwaukee's plans to control combined sewer overflow on cost-effective bases consistent with federal statutory and administrative regulations (P.Ex. 23-30, Tr. 124, 388, 395, 396), the District Court said:

> " I read much of the material in the Combined Sewer Overflow study [of Milwaukee] and I find in it no express commitment to the elimination of the overflows. What I find is reference to 'control' of the overflows and 'reduction' of overflows. It is not altogether clear to me that the Combined Sewer study starts with the proposition that the overflows must be eliminated.
>
> I can save a lot of time, and I am going to save a lot of time in the event any further study of that issue is contemplated, because it will be and it is the ruling of this court that all overflows shall be eliminated." Pet. App. F-25.

With respect to costs, the District Court blandly stated:

> "This brings us to the matter of cost, as to which there has been considerable controversy in this case. I think we should break it down into two things, because it is easy to get carried away by the huge numbers that have been bruited about. In my view, the cost of eliminating the overflows is not really a factor here." Pet. App. F-28.

Thus, the District Court ordered the total elimination of overflows, ordered that the cost of accomplish-

ing this objective was not a factor, and ordered the parties to submit timetables to carry out the remedy so imposed on Milwaukee. The Court of Appeals affirmed, but with the comment that:

> "[T]he defendants do not provide us with evidence sufficient to justify disagreement with what the court found necessary or evidence sufficient to show that the marginal increase in cost of building a facility of the size required by the district court is significantly greater than the cost of building a facility of the size presumably contemplated by defendants." 599 F.2d at 173 (Pet. App. A-39).

Milwaukee is faced with compliance with a costly judgment of the District Court which determined costs were not a factor; a judgment affirmed by a Court of Appeals on the basis of Milwaukee's failure to provide it with the very same evidence which the District Court gave Milwaukee no opportunity to present! That evidence has now been refined, and shows costs of approximately $300,000,000 to comply with the requirement of eliminating sewer overflows, over and above amounts required under the congressional permit system for CSO control.[22]

When one considers that the numbers involved in this case amount to literally hundreds of millions of dollars for Milwaukee alone, and to tens of billions of dollars for the nation as a whole, the conduct of the trial court in denying the relevancy of costs and cost effectiveness, and preventing full proof thereof, fol-

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[22] In accordance with paragraph 8 of the District Court's Judgment Order, defendants have made extensive engineering studies (including Pilot Plant operations) which have refined these costs (Pet. App. D-8). The studies have all been monitored by Illinois engineers at Milwaukee's cost in accordance with paragraph 4 of the Judgment Order (Pet. App. D-6).

lowed by an appellate decision predicated on a lack of evidence of costs, cannot be permitted to stand.

The *ad hoc* approach of the courts below, unless reversed, will establish a precedent creating untold harm to the uniform, fiscally responsible approach adopted by Congress in FWPCA and administered by the EPA. In mandating the total elimination of all overflows without respect to cost, the availability of federal funds, or the availability of practicable measures to control sewer overflows, the courts below have subjected the rights of individual citizens, municipalities and states throughout the United States to a precedent having impact upon the entire nation's water resources and having fiscal impacts reaching magnitudes important even to the total federal budget, let alone the budgets of affected municipalities and states.

H. Congress Recognized and Dealt With Fiscal Impacts.

In enacting FWPCA, Congress recognized that while substantial local and state funds would be required to alleviate detrimental discharges to the nation's waters, imposing the full burden of such an undertaking on individual municipalities would lead to fiscal disaster. Thus, the congressional enactments clearly contemplate federal subsidization to a very substantial percentage of the total cost, usually 75%, and further provide for delays in capital expenditures in the event federal funds are not available. In fact, Congress specifically amended FWPCA in 1977 to provide for extensions of time where the municipalities' failures to provide the mandated controls were caused by the unavailability of federal funds (Sec. 301(i) (§ 1311(i) of FWPCA).

With the huge dollar amounts involved in wastewater treatment, no lengthy analysis is needed to demonstrate that if abatement requirements are imposed on individual municipalities without consideration of financial resources, including the availability of federal funds, and of the relative benefits achieved by the requirements of enormous expenditures local fiscal disasters are not only possible but inevitable. Congress clearly recognized this basic consideration.

In contrast, the District Court said:

> "The terms of this order are binding upon the defendants whether or not federal financial assistance becomes available. I hope that federal assistance is made available but if it is not, the program decreed by this order must proceed nonetheless." Pet. App. F-28.

> "But I want to disabuse you right now, Mr. Moerke, and thereby save you some time—that is why I am saying it now. There is no point in your preparing a lot of testimony on alternate theories —if you don't get federal money, it is going to take you this much longer, and preparing experts to say how much longer—because as I said earlier, on the 29th of July, this order will not be contingent upon your getting federal funding. Milwaukee sewage is not a federal problem." Transcript of September 9, 1977 hearing before the District Court at 42.

Contrast the Congressional statement of policy in the Act:

> "[I]t is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works. . . ." Sec. 101(a)(4) (§ 1251(a)(4)).

Congress has balanced political considerations in providing that federal funding is a significant factor to be considered in the timing and implementation of wastewater treatment programs and the control of overflows, recognizing that political and fiscal realities are necessarily encountered in dealing with problems connected with the nation's waters. This is directly contrary to the position exemplified by the Court of Appeals comment that "no one even attempts to justify such [overflow] discharges as harmless or insignificant." The justification is in a political balance of fiscal resource allocation. Both of the courts below explicitly refused even to consider fiscal impacts or cost-effectiveness. After stating its conclusion that cost and the availability of federal funds are irrelevant, the District Court required that the "program decreed by this order must proceed nonetheless . . . Milwaukee sewage is not a federal problem." (Pet. App. F-28 and transcript of September 9, 1977 hearing before the District Court at 42). The courts and Congress could not be further apart.

I. Congress and This Court Require a Balancing of Equities, But the Courts Below Failed and Refused to Do So.

The congressional approach is termed the "cost-effective" approach by engineers; it equates in large part to the doctrine of balancing the equities found in the courts. As shown above, the courts here have refused to even permit cost evidence on which to consider an equitable balance. In *Eccles* v. *Peoples Bank*, 333 U.S. 426 (1948), where a declaratory judgment was sought, this Court broadly stated:

> "It is always the duty of a court of equity to strike a proper balance between the needs of the plaintiff

> and the consequences of giving the desired relief. Especially where governmental action is involved, courts should not intervene unless the need for equitable relief is clear, not remote or speculative." 333 U.S. at 431.

See generally, Annot., 40 A.L.R. 3rd 601 (1971).

With respect to health, the District Court found that fecal coliform counts on Illinois' Lake Michigan beaches failed to demonstrate any pollution coming from Milwaukee, and that there is no evidence of any outbreak of water-related diseases in Illinois. With respect to eutrophication, the District Court found that it is impossible to measure accurately any effect on the lake caused by Milwaukee's discharges, or to measure accurately the diminution in the amount of nutrients in the lake if such discharges were altogether discontinued. Then it proceeded to formulate a remedy for a speculated nuisance rather than one established in the record, and refused to permit evidence necessary to a balancing of the equities and hardships in formulating the remedy.

The District Court precluded evidence dealing with practicable means of *controlling* sewer overflows, short of complete *elimination,* and evidence dealing with the monumental costs of, and the lack of cost-effectiveness of, complete elimination of sewer overflows (Pet. App. F-25). The District Court consequently eliminated any possibility of balancing the equities and hardships in formulating the terms of the mandatory injunction it granted. Thus, the District court failed to exercise informed judgment as required by this Court. *Illinois* v. *Milwaukee, supra,* at 108-109 (Pet. App. I-17 and 18). In affirming the District Court's order to eliminate

all sewer overflows, the Seventh Circuit relied upon the very evidence which the District Court precluded. 599 F.2d at 173 (Pet. App. A-39).

Regarding the balancing requirement in the context of what injunctive relief should be granted, D. Dobbs, *Remedies* (1973) states at 54-55:

> "The second stage of remedial analysis is the shaping of the remedy. Where the plaintiff . . . is to recover an injunction, it is the problem of formulating appropriate terms. For instance, in a simple nuisance case, the plaintiff may complain of a factory's loud operation down the block from his residence. If the court decides that this is indeed a nuisance, and balances equities and hardships in favor of the plaintiff, there is the task of providing specific commands in the injunction. And this, too, requires some balancing."

Harrison v. *Indiana Auto Shredders Co.*, 528 F.2d 1107 (7th Cir. 1976), the decision relied upon the Seventh Circuit for the proposition that an injunction is appropriate when an imminent danger to health is involved, 599 F.2d at 166 (Pet. App. A-24), recognized the necessity of balancing equities and hardships in a reasonable fashion:

> "Of course, where the pollution from a mill or factory creates hazards that imminently and dangerously affect the public health, the appropriate relief is a permanent injunction against the continuation of the polluting activities. It would be unreasonable to allow a private interest in the profits and products of a polluting menace to outweigh the community's interest in the health of its citizens. However, a permanent injunction that shuts down a mill or factory without consideration of the extent of the harm that its pollution caused would be equally unreasonable . . . [R]easonable-

> ness is the standard by which the court should fashion its relief in ordinary nuisance cases, [cite deleted], and reasonableness is also the appropriate standard for relief from environmental nuisance." 528 F.2d at 1122-1123.

In *Cappaert* v. *U.S.*, 426 U.S. 128 (1976), this Court applauded the appropriate balancing of equities and hardships by the District Court in formulating injunctive relief. That case involved the request for injunctive relief to prevent the drawdown of ground water which would extinguish a unique species of subterranean fish. The court stated:

> ". . . [A]s the District Court has correctly determined, the level of the pool may be permitted to drop to the extent that the drop does not impair the scientific value of the pool as the natural habitat of the species sought to be preserved. *The District Court thus tailored its injunction, very appropriately, to minimal need,* curtailing pumping only to the extent necessary to preserve an adequate water level in Devil's Hole, thus implementing the stated objectives of the Proclamation." 426 U.S. 141 (emphasis added).

Unlike the court in the *Cappaert* case, the District Court herein did not limit its injunction to minimal need. The District Court acted unreasonably in precluding evidence on remedial steps less stringent than total elimination of overflows (which would eliminate the vast majority of the pollution), and in refusing evidence of the costs and the lack of cost-effectiveness of such complete elimination, particularly in light of (a) the total absence of any empirical showing of harm, (b) the direct disagreement among the experts as to the theoretical possibilities of harm, and (c) the compliance of Milwaukee with discharge permits

granted pursuant to the comprehensive federal water pollution laws and regulations discussed above.

II. THE DECISIONS BELOW IGNORED PREVIOUS DECISIONS OF THIS COURT WHICH ARE CONTROLLING PRECEDENT AND WHICH ESTABLISH THAT, IN THE ABSENCE OF EMPIRICAL EVIDENCE OF ANY NUISANCE, THE CONFLICTING TESTIMONY OF EXPERT WITNESSES IS NOT SUFFICIENT TO ACCORD RELIEF IN AN ACTION ALLEGING AN INTERSTATE NUISANCE.

A. The Record Is Devoid of Any Empirical Evidence of Nuisance in Illinois or Michigan Waters. The Courts Below Could Rely Only on the Speculations of Experts Which Were Contradicted by Historical Fact.

A fundamental, basic and controlling fact of this case is that no witness and no exhibit in the entire record found any virus or other pathogen from any source in any Illinois or Michigan waters. Instead, the evidence presented by the plaintiffs consisted of inconclusive "fecal coliform counts" and the conclusions and opinions of experts, all of whom the District Court noted were interested in the outcome of the case, and none of whom were neutral as between the parties or as to the outcome of the case (Pet. App. F-4). Specifically, the District Court made the following findings *after first acknowledging* (1) that the expert testimony was sometimes over the head of the court, that the court's grasp of some of the testimony was less complete than the court would have liked it to be, and (2) that the court would have had to enroll in a university course directed at a reorientation of its entire education to remedy this deficiency (Pet. App. F-3 and 4):

1. If the position of the State of Illinois is correct, a properly conducted study should have resulted

in some circumstantial evidence that would tend to confirm Illinois' theory. The State of Illinois could have performed studies to determine whether Milwaukee sewage effluents are not sufficiently diluted in and by Lake Michigan so that only insignificant numbers of pathogens and other pollutants, if any, could reach Illinois waters. Illinois elected not to do so because it was afraid of a negative result and in so electing chose to produce less evidence than it should have (Pet. App. F-10).

2. There are fecal coliform counts on Illinois beaches which fail to demonstrate any pollution coming from Milwaukee (Pet. App. F-11).

3. There is no evidence of any outbreak of water-related diseases in Illinois (Pet. App. F-12).

4. There is no evidence of any present effect of Milwaukee discharges or, for that matter, of the effect of any other nutrient discharges, on fish life in the lake (Pet. App. F-18).

5. There is no evidence that any specific algal problem or any specific taste and odor problem experienced by residents of Illinois or Michigan is attributable to Milwaukee sewage as opposed to the nutrients discharged by any other point or non-point source. (*Id.*)

6. It is impossible to measure accurately any effect on the lake caused by Milwaukee's discharges or to measure accurately the diminution in the amount of nutrients in the lake if Milwaukee discharges were altogether discontinued (Pet. App. F-19).

Thus, the fact is that there has been no showing of any disease or any other adverse effect resulting in Illinois or Michigan waters from sewage discharges in Wisconsin during the century or more that Milwaukee

has been discharging to Lake Michigan. Indeed, no outbreak of disease has been shown to have occurred in Milwaukee itself, though Milwaukee's drinking water intakes are close to the points of discharge while those of Illinois and Michigan are, to say the least, remote. Note that the concern expressed by the courts below related to enteroviral diseases, and such diseases manifest themselves in a matter of weeks after exposure (Tr. 2139, 2198). Certainly if there were any merit to the speculated hazard, there would be *some* evidence of its existence, some evidence that it actually caused *something* in the lengthy span of time during which the supposed hazard has existed. There is nothing!

This Court's 1972 decision in *Illinois* v. *Milwaukee* relied upon previous decisions of this Court as having established a "federal common law" relating to interstate nuisance controversies. These cases are *Missouri* v. *Illinois,* 180 U.S. 208, 200 U.S. 496 (1901, 1906), *New York* v. *New Jersey,* 256 U.S. 296 (1921) and *North Dakota* v. *Minnesota,* 263 U.S. 365 (1923).

The status of the evidence in this case as summarized in the findings of the District Court set out above is strikingly similar to the evidence before this Court in *Missouri* v. *Illinois, supra.* This Court rendered two decisions in the *Missouri* v. *Illinois* case. The first decision, reported at 180 U.S. 208, dealt with procedural matters at the demurrer stage of the proceedings.

When the *Missouri* case came before the Supreme Court on the merits, Justice Holmes had this to say about the earlier decision (the only one cited by the District Court in this case):

> "The decision upon the demurrer discussed mainly the jurisdiction of the court, and, as leave to answer

was given when the demurrer was overruled, naturally there was no very precise consideration of the principles of law to be applied if the plaintiff should prove its case. That was left to the future, with the general intimation that the nuisance must be made out upon determinate and satisfactory evidence, that it must not be doubtful, and that the danger must be shown to be real and immediate.

* * *

But the evidence now is in, the actual facts have required for their establishment the most ingenious experiments, and for their interpretation the most subtle speculations, of modern science, and therefore it becomes necessary at the present stage to consider somewhat more nicely than heretofore how the evidence in it is to be approached." 200 U.S. at 517-518.

Justice Holmes proceeded to emphasize two major legal principles: (1) Congress has the power to enact the paramount law, and (2) the courts should not take the place of the legislature.

"In the case at bar, whether Congress could act or not, there is no suggestion that it has forbidden the action of Illinois. The only ground on which that state's conduct can be called in question is one which must be implied from the words of the Constitution. The Constitution extends the judicial power of the United States to controversies between two or more states, and between a state and citizens of another state, and gives this court original jurisdiction in cases in which a state shall be a party. Therefore, if one state raises a controversy with another, this court must determine whether there is any principle of law, and, if any, what, on which the plaintiff can recover. But the fact *that this court must decide does not mean, of course, that it takes the place of a legislature* . . .

> If we suppose a case which did not fall within the power of Congress to regulate, the result of a declaration of rights by this court would be irrevocable by any power except that of this court to reverse its own decision, an amendment of the Constitution, or possibly an agreement between the States, sanctioned by the legislature of the United States.
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> * * *
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> The difficulties in the way of establishing such a system of law might not be insuperable, but they would be great and new." 200 U.S. at 518-520 (emphasis added).

The Supreme Court then stated that these legal principles affect the manner in which a court must view the evidence.

> "It is decided that a case as is made by the bill may be a ground for relief. The purpose of the foregoing observations is not to lay a foundation for departing from that decision, *but simply to illustrate the great and serious caution with which it is necessary to approach the question whether a case is proved.*" 200 U.S. at 520 (emphasis added).

The Supreme Court then turned to the evidence. It is strikingly similar to—though much stronger than—the evidence before the courts below:

> "*The plaintiff's case depends upon an inference of the unseen.* It draws the inference from two propositions. First, that typhoid fever has increased considerably since the change, and that other explanations have been disproved; [No enteroviral outbreaks were shown in the *Milwaukee* case now before the Court] and second, that the bacillus of typhoid can and does survive the journey and reach the intake of St. Louis in the Mississippi.

We assume the now-prevailing scientific explanation of typhoid fever to be correct. But when we go beyond that assumption, eveything is involved in doubt. The data upon which an increase in the deaths from typhoid fever in St. Louis is alleged are disputed. The elimination of other causes is denied. The experts differ as to the time and distance within which a stream would purify itself. No case of an epidemic caused by infection at so remote a source is brought forward and the cases which are produced are controverted.

The Chicago drainage canal was opened on January 17, 1900. The deaths from typhoid fever in St. Louis, before and after that date, are stated somewhat differently in different places . . . we assume that the increase is real. Nevertheless, comparing the last four years with the earlier ones, it is obvious that the ground for a specific inference is very narrow, if we stopped at this point. The plaintiff argues that the increase must be due to Chicago, since there is nothing corresponding to it in the watersheds of the Missouri or Mississippi. On the other hand, the defendant points out that there has been no such enhanced rate of typhoid on the banks of the Illinois as would have been found if the opening of the drainage canal were the true cause. [in the instant case there is no empirical evidence of disease or pathogen presence]

* * *

Both sides agree that the detection of the typhoid bacillus in the water is not to be expected [In the *Milwaukee* case, the trial court found that plaintiff had chosen not to perform available detection studies, thus producing less evidence than it should have because fearful of the result!]. But the plaintiff relies upon proof that such bacilli are discharged into the Chicago sewage in considerable quantities; that the number of bacilli in the water of the Illinois is much increased, including the

> *bacillus coli communis,* which is admitted to be an index of contamination, and that the chemical analyses lead to the same inference.
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> * * *
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> On the other hand, the defendant's evidence shows a reduction in the chemical and bacterial accompaniments of pollution in a given quantity of water, which would be natural in view of the mixture of nine parts to one from Lake Michigan. It affirms that the Illinois is better or no worse at its mouth than it was before, and makes it at least uncertain how much of the present pollution is due to Chicago and how much to sources further down, not complained of in the bill. It contends that if any bacilli should get through, they would be scattered and enfeebled and would do no harm." 200 U.S. at 517-527 (emphasis added).

While the evidence before the Court in *Missouri* v. *Illinois* was strikingly similar to and considerably stronger than that present here (in the absence of tests that could and should have been performed by plaintiff), the result reached by the Supreme Court is the opposite of that reached by the courts below—the Supreme Court dismissed the case!

Similarly, the Supreme Court in *New York* v. *New Jersey, supra,* met the same evidentiary problem and held that in such a situation history prevails over the speculation of experts.

> "[T]he evidence of the complaint is that, as early as 1906, the water adjacent to New York City . . . was much polluted by sewage, but that the water in other parts of the bay, especially near Robbins reef light, was somewhat, but not greatly, contaminated . . . And the evidence taken under the order of the court in 1919 shows an irreconcilable conflict in the testimony as to the then condition of

> the water, especially near Robbins reef light. [I]t is undisputed that . . . New York sewage, untreated, was discharged from over 450 sewers directly into the adjacent waters . . . .
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> * * *
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> It would seem, therefore, that if the anticipations of the experts for the complainants, as to the results likely to be produced by the effluent from the sewer of defendants, were well founded, by the year 1919 [in the case of Milwaukee, 1972] conditions in the harbor should have become so pronounced and plain [in the case of Milwaukee the epidemics of enteroviral disease would have been so rampant] that there could not have been such conflict as the record shows in the testimony of trustworthy and competent scientists as to its then existing condition.
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> * * *
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> [W]e must conclude that the complainants have failed to show by the convincing evidence which the law requires that the sewage which the defendants intend to discharge into Upper New York Bay . . . would so corrupt the water of the Bay as to create a public nuisance . . . ." 256 U.S. at 311-314.

Contrary to the action of the courts here, which found liability and imposed severe and costly remedies on the defendants, the Supreme Court there, in extremely similar fact circumstances, dismissed the action. That same result is compelled here where there is *no* empirical evidence of *any* effect from more than a hundred years of Milwaukee's discharges to Lake Michigan, and where the experts were in direct disagreement as to the theoretical possibilities of effect.

This is particularly true in light of the fact that Milwaukee's discharges to Lake Michigan have been and continue to be the subject of a statutory scheme

administered by an independent federal agency interested only in the public health and public navigable waters, and which agency is unbiased as between contesting parties.

Of more than passing interest is the fact that Illinois and Michigan chose not to participate in the administrative proceedings relating to Milwaukee's permits although, under the federal statute, they had notice and a full opportunity to do so. Section 302(a) (§ 1312 (a)); § 509(b) (§ 1369(b)); § 402(b)(5), (§ 1342(b) (5)); Wis. Stat. § 147.20 (1977). Those states and states relying on this case for precedent should not be permitted to take weak cases to non-expert federal court forums for a trial on expert opinion to avoid the application of independent, neutral expertise under the congressionally enacted permit system.

An analysis of respondents' proof below leads to reversal. The analysis starts with the legal truism that in order for respondents to prevail they must have introduced some evidence of the actual state of Lake Michigan water within the jurisdiction of each of the respondents. Lake Michigan is out there; its waters are available for scientific analysis. Testing procedures to prove the existence of the dangers speculated upon by the witnesses are known and available. Yet respondents chose to do no such testing—a choice which the District Court characterized as having been made out of fear over the results (Pet. App. F-10). Are there viruses in Illinois' waters? Are there pathogenic bacteria in Illinois' waters? The best that can be said for the record before this Court is that no one really knows and that the respondents did not attempt to prove what was there because they did not want to find out for sure.

The respondents should have been required to come forward with some empirical evidence relating to public health and actual conditions in the lake. This was the type of evidence required by the Supreme Court when it had occasion to deal with similar issues. Before a court imposes liability for untold millions of dollars of expense, should it not know whether there is in fact any imminent hazard to health? Should it not at least require that an attempt be made to determine the existence of the alleged dangers?

Speculations by the courts below as to remotely possible occurrences inferred from the outer reaches of expert hypotheses cannot stand against known and observable facts before the court. Here such physical tests as were taken in Lake Michigan were taken by Milwaukee, and they negate the existence of pathogens in Illinois waters. Even more importantly, the fact that there has been no outbreak of any water-borne infections or diseases in Illinois certainly negates any claim that a hazard exists or has existed in the last hundred years that Milwaukee has been discharging effluent to Lake Michigan 25 miles away from Illinois.

Where a party claims that a hazard exists requiring injunctional intervention at hundreds of millions of dollars in cost, and where that alleged hazard has existed for a hundred years, the language and logic of the Supreme Court in *North Dakota* v. *Minnesota, supra,* should put an end to the controversy:

> "It is difficult for a court to decide issues of fact upon which experts equal in number and standing differ flatly, and when their conclusions rest on estimates upon the correctness of which the court, without technical knowledge, cannot undertake to pass. In such cases, the court looks about for out-

standing facts from which the lay mind can safely draw inferences as to the probabilities.

* * *

To attribute to such a minor but constant artificial incident a phenomenal effect for two whole summer seasons without a recurrence since is to fly in the face of all reasonable probability. The evidence must be clear and convincing indeed to support such a theory. Instead of that, it is a combination of estimates and conjecture based on no accurate knowledge of the flow of the Mustinka before the ditches were put in, and depending greatly on a hypothetical detaining basin in the so-called Delta zone, existence of which the greater weight of the evidence negates.

* * *

The conclusion we have come to on the main issue of fact—that Minnesota is not responsible for the floods of which complaint is made—makes it unnecessary for us to consider this evidence as to a practical remedy for them, and requires us to leave the opinions and suggestions of the expert engineers for the consideration of the two states in a possible effort by either or both to remedy existing conditions in this basin." 263 U.S. at 385-388.

While thousands of pages of transcript and hundreds of exhibits have been adduced, the record as a whole does not establish a right to relief with sufficient clarity to necessitate a decision on the effect of the federal statutes and the underlying administrative action upon the federal common law of water pollution nuisance the respondents advocate.

This Court has repeatedly held that speculations based on hypotheses of experts do not rise above demonstrated and demonstrable facts. Here the facts are clear. No pathogens have been shown in Illinois waters.

No effects of pathogens have been shown in Illinois. No accelerated eutrophication resulting from defendants' discharges has been shown in either Illinois' or Michigan's territorial waters. All we have is some expert hypotheses opposed by other expert hypotheses, followed by a never-ending and inconclusive chain of speculation.

B. Neither Illinois Nor Michigan Require the Level of Control of Overflows Ordered by the Courts Below.

If the hazards which Illinois and Michigan allege are posed by Milwaukee's overflows were truly a concern, rather than being a strawman for this litigation, one would assume that a requirement to eliminate all overflows would be imposed by both Illinois and Michigan on their own municipal sewage discharges to protect their own citizens. In fact, neither Illinois nor Michigan require the total elimination of all overflows as ordered by the courts below.

In *Missouri* v. *Illinois, supra,* this court stated:

> "Where, as here, the plaintiff has sovereign powers, and deliberately permits discharges similar to those of which it complains, it not only offers a standard to which the defendant has the right to appeal, but as some of those discharges are [at points where they could cause the injury complained of], it warrants the defendant in demanding the strictest proof that the plaintiff's own conduct does not produce the result, or at least so conduce to it that courts should not be curious to apportion the blame." 200 U.S. at 522.

Illinois does not prohibit combined sewer overflows nor require their complete elimination. Illinois Pollution Control Board Rules and Regulations, Chapter 3:

Water Pollution, § 602(c) (1976) (P.Ex. 171 at 30-31) states in relevant part:

> "All combined sewer overflows and treatment plant bypasses shall be given sufficient treatment to prevent pollution or the violation of applicable water quality standards. Sufficient treatment shall consist of the following:
>
> (1) All dry weather flows, and the first flush of storm flows as determined by the Agency, shall meet the applicable effluent standards;
>
> (2) Additional flows, as determined by the Agency but not less than ten times the average dry weather flow for the design year, shall receive a minimum of primary treatment and disinfection with adequate retention time;
>
> (3) To the extent necessary to prevent accumulations of sludge deposits or depression of oxygen levels, flows in excess of those described under paragraph (c)(2) above shall be treated by retention and return to the treatment works or otherwise. When the Agency finds it necessary, part or all of such excess flows shall be treated to substantially remove floating debris and solids."

The above regulation means that only dry weather flows and the "first flush" of storm flows (as determined by the Illinois EPA) are required to meet applicable effluent standards.[23] After the "first flush,"

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[23] Applicable effluent standards in Illinois range from 4 mg/l BOD5 and 5 mg/l SS all the way up through 30 mg/l BOD5 and 37 mg/l SS, depending upon the volume of waste discharged (expressed in the Illinois regulations as "population equivalents") and the "dilution ratio" of the effluent into the receiving body. Illinois Pollution Control Board Rules and Regulations, *supra*, §§ 104 and 404 (P.Ex. 171 at 3, 22-25). The only exception to the

storm flows equal to ten times the average "dry weather flow" need to receive only "primary treatment and disinfection with adequate retention time." Storm flows in excess of the "first flush" and ten times the

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foregoing is Lake Michigan, where an effluent limitation of 4 mg/l BOD5 and 5 mg/l SS is specified without regard to waste volumes or dilution ratios. (Because of the drainage hydrology of Illinois, only Chicago and Waukegan discharge occasional overflow sewage effluent into Lake Michigan, with their normal discharges ultimately flowing into the Mississippi River, like all other Illinois sewer systems which discharge into waters to the west. Significantly, the Chicago and Waukegan discharges to Lake Michigan are sewer overflows which do not meet Lake Michigan discharge standards! See "Supplemental Response of the State of Illinois to Applicants' Motion for Stay Pending Certiorari," dated May 7, 1980, at 6-7.)

Except for discharges to certain bodies of water, the applicable effluent standards are intended to make all waters in Illinois suitable for "general use" and "public and food processing water supply use." Illinois Pollution Control Board Rules and Regulations, *supra*, §§ 104 and 301-303 (P.Ex. 171 at 5, 19-20, Tr. 3719). Thus, the effluent standard which must be met by the "first flush" of storm flows from combined sewer overflows will vary throughout Illinois, even though the waters into which such discharges are made will often have identical designated "uses."

The Illinois regulations themselves do not define "first flush," but the Illinois EPA has promulgated "Procedures for Determining Compliance With Rule 602(c) of Chapter 3: Water Pollution Regulations of the Illinois Pollution Control Board" (Technical Memorandum 3, June 1, 1977) which states as follows:

> "The storm chosen to determine first flush effects must have a minimum recurrence interval of one year."

In contrast, the District Court's remedy of "complete elimination" of sewer overflows requires Milwaukee to construct a sewer system with a capacity sufficient to contain the largest storm of record in Milwaukee during the 37-year period from 1940 to 1977 (Pet. App. D-3). Of course, it is entirely possible that the largest storm of record in Milwaukee during the 1940-1977 period has a recurrence interval significantly greater than 37 years (i.e., a storm having a recurrence interval of 100 years—or 1,000 years, for that matter—could have occurred during the 37 year period).

average dry weather flow need not receive any treatment whatsoever except to the extent necessary to prevent "accumulations of sludge deposits or depression of oxygen levels," or to remove "floating debris and solids" if the Illinois EPA determines that to be necessary.

Significantly, the Illinois regulations were amended in 1977 to expressly *exempt from compliance* with even the foregoing requirements (which have not been amended to date) all combined sewer overflows with respect to which appropriate steps have been taken to secure federal construction grant funds under Sec. 201(g) of FWPCA (§ 1281(g)), until completion of construction under the grant provided. Illinois Pollution Control Board Rules and Regulations, *supra,* § 602(d) (1976) states in relevant part:

> "Compliance with paragraph (c) of this Rule 602 shall be achieved on or before the following dates:
>
> * * *
>
> (2) All combined sewer overflows within the Metropolitan Sanitary District of Greater Chicago, by December 31, 1977;
>
> (3) All other combined sewer overflows, by December 31, 1975.
>
> (4) *The compliance dates set by (d)(2) and (d)(3) shall be met unless:*
>
> (aa) The discharger's combined sewer overflow is eligible for a construction grant under Section 201(g) of the FWPCA; and,
>
> (bb) The discharger has filed an application for a construction grant on or before March 1, 1977; and,

(cc) The discharger has timely taken all appropriate pre-grant and post-grant actions necessary to the specific grant step for which the discharger is then eligible.

* * *

(7) The exemption provided by (d)(4) above shall terminate upon completion of construction under the grant provided and compliance with the provisions of this Rule shall thereafter be required." (emphasis added)

In short, Illinois requires only the "first flush" of storm flows from combined sewers to meet applicable effluent limitations, and even that requirement is waived until federal funding has been received and related construction has been completed. That is a far cry from the onerous burden imposed upon Milwaukee by the courts below of requiring *all* combined sewer overflows to meet applicable effluent limitations regardless of cost or the availability of federal financial assistance.[24]

The State of Illinois, through its Environmental Protection Agency, has permitted the City of Waukegan, which is served in part by combined sewers, to build a treatment plant which will allow bypasses of sewage into Lake Michigan from what is defined as a "one-year storm" (Tr. 13444-45, 13450).

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[24] In upholding the District Court's requirement that all of Milwaukee's combined sewer overflows be "eliminated" (i.e., treated to meet applicable effluent limitations), the Court of Appeals incorrectly believed that that remedy was equivalent to what Illinois requires of its own dischargers:

> "These requirements [Illinois Pollution Control Board Rules and Regulations, *supra*, § 602(c)] seem to be comparable to the treatment of overflows from the collection and conveyance system described by the district court." 599 F.2d at 173 (Pet. App. A-39).

Illinois permits the City of Chicago to discharge large volumes of untreated sewage into Lake Michigan by means of reversals or "backflows" of the Chicago Canal System. Such backflows into Lake Michigan of hundreds of millions of gallons of polluted river water containing untreated sewage have occurred 19 times from 1959 through 1978, with 12 of those in the last 10 years (Tr. 4026-4034; D.Ex. 170 p. 9, Tr. 4024; GAO *Report by the Comptroller General of the United States,* CED-79-77, *supra* at Vol. 1, p. 18).

In the City of Chicago, where combined sewers service one of the largest areas and population in the United States, the planned TARP project, even if finally completed at a cost estimated to be between $4 billion and $11 billion, *will not eliminate overflows. Id.* at Vol. 1, pp. 4-5.

With respect to the State of Michigan, on September 9, 1977, that State entered into a consent judgment in Civil Action No. 77-1100, in the United States District Court for the Eastern District of Michigan, wherein the United States of America was the plaintiff and the State of Michigan and the City of Detroit were defendants. That consent judgment does not require the "elimination" of combined sewer overflows. Rather, it mandates a program for the attainment of "control" of overflows from the combined sewer system in a cost effective manner (*United States* v. *State of Michigan et al,* E.D. Mich. No. 77-1000, Sept. 9, 1977, judgment p. 29).

The difference in cost between a system which has the capacity to eliminate overflows totally, as distinguished from an environmentally sound, cost-effective system to control overflows, is hundreds of millions of

dollars in Milwaukee alone. The precedental effect of requiring total elimination of sewer overflows would be fiscally disasterous to the nation. The imposition of such a burden on Milwaukee at the behest of sovereign states which do not impose similar burdens on their own citizens cannot be justified by reliance upon federal common law.

III. THIS ACTION SHOULD HAVE BEEN DISMISSED ON THE GROUND: (1) THAT THE COURT HAD NO JURISDICTION OVER THE PERSON OF THE DEFENDANTS, OR (2) THAT THE VENUE IN THE ACTION WAS IMPROPERLY LAID IN THE DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, OR UPON BOTH SUCH GROUNDS.

This action was commenced in the United States District Court for the Northern District of Illinois by the filing of a complaint alleging three causes of action, the first based upon the federal common law of nuisance, and the second and third based upon state statutory and common law. The first was held by the Court of Appeals to be controlling, so as to preclude the latter two from being addressed. 599 F.2d at 177 N.53 (Pet. App. A-46 n.53).[25] The complaint was served upon the defendants pursuant to the Illinois "longarm" statute, Ill. Rev. Stat. ch. 110, § 17 (1971) (see "Statutory Provisions Involved", *supra*).

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[25] There can be no diversity jurisdiction in this case. As this Court pointed out in *Illinois* v. *Milwaukee*, *supra*:

> "It is equally well settled that a suit between a state and a citizen of another state is not a suit between citizens of different states for the purposes of diversity of citizenship jurisdiction." 406 U.S. at 97 n.1 (Pet. App. I-6 n.1).

Thus, dismissal of the federal count carries with it the two state law counts.

Subsequent to the service of the complaint, Milwaukee moved to dismiss the action on the ground that the court lacked personal jurisdiction and that venue of the action did not properly lie in the Northern District of Illinois. The trial court (Judge Bauer presiding) denied these motions. *Illinois* v. *Milwaukee,* 4 E.R.C. 1849, 1850 (N.D. Ill. 1972) (Pet. App. H-4).

The facts in this case clearly establish that none of the petitioners have acted in any way which would justify the conclusion that they had either committed "a tortious act *within*" the State of Illinois (the statutory requirement to come under the Illinois long-arm statute) or that they had the requisite "minimal contacts" with the State of Illinois to satisfy the constitutional prerequisite to the exercise of power over them by the State of Illinois. This is not a products liability case where it is arguable that the act of a manufacturer in shipping a product into a state is that type of act by which the manufacturer purposely avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protection of its laws. *Cf., International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945); *Hanson* v. *Denckla,* 357 U.S. 235 (1958). Here the defendants do nothing in the State of Illinois. They take no act to purposely avail themselves of the privilege of conducting activities within the State of Illinois; they receive no benefits or protection from the laws of the State of Illinois. The courts below brushed aside the difficult statutory and constitutional issues presented by the facts of this case and Milwaukee's motion to dismiss by summarily rejecting the motion.

The treatment of the venue issue below was equally summary. The courts relied upon 28 U.S.C. § 1391(b), which states:

> "A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law."

Specifically, the courts below relied upon the words "or in which the claim arose," and opined that the claim of the State of Illinois arose in the Northern District of Illinois "where the injury was suffered." This was error. The courts below are bound by relevant federal authority. See, *Cole* v. *Trustees of Columbia University,* 300 F.Supp. 1026, 1029 (S.D.N.Y. 1969) and Sec. 505(c)(1) of FWPCA (§ 1365(c)(1)), which statute provides as follows:

> "Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located."

Though Milwaukee pointed out that, as a matter of law, the claims made against them in the complaint were inherently "local" in nature, the District Court concluded that the claims were "transitory" (Pet. App. H-3). The Court of Appeals held that this distinction was not significant (Pet. App. A-5 and 6). In reaching these conclusions, the courts disregarded the decisions of this Court which held that nuisance actions are "local" (their locus is their source) and not "transitory" (their locus does not follow to any place of asserted damage). *Ladew* v. *Tennessee Cop-*

per Co., 218 U.S. 357 (1910); *Mississippi and M.R. Co.* v. *Ward*, 2 Black. 485 (1863). The courts below also disregarded the long established principle that actions against municipal corporations are themselves inherently local in nature, so much so that absent a specific statutory provision to the contrary, they cannot be brought outside the judicial district where the municipal corporation is situated. See, Annot., 93 A.L.R. 500 (1934); *Parks Co.* v. *City of Decatur, Ill.*, 138 F. 550 (6th Cir. 1905); *Markham* v. *City of Newport News, Va.*, 184 F.Supp. 659 (E.D. Va. 1960).

Now this Court has clarified the meaning of § 1391 (b) in *Leroy* v. *Great Western United Corp.*, 443 U.S. 173 (1979). As clarified, venue was improperly laid in the Northern District of Illinois, thus requiring reversal and a direction to dismiss. This Court stated:

> "In our view, therefore, the broadest interpretation of the language of § 1391(b) that is even arguably acceptable is that in the unusual case in which it is not clear that the claim arose in only one specific district [footnote omitted] a plaintiff may choose between those two (or conceivably even more) districts that with approximately equal plausibility—in terms of the availability of witnesses, the accessibility of other relevant evidence, and the convenience of the defendant (but *not* of the plaintiff)—may be assigned as the locus of the claim." 443 U.S. at 185 (emphasis in original).

In this case *all* of the conduct complained of occurred in the Eastern District of Wisconsin; very few of the witnesses (including respondents' witnesses) resided in the district of trial; many of Milwaukee's witnesses and *all* of the petitioners reside in the East-

ern District of Wisconsin, not in the Northern District of Illinois.

In the absence of personal jurisdiction and appropriate venue, this action should be dismissed.

CONCLUSION

Petitioners respectfully request the following relief:

1. That the decision of the Court of Appeals be reversed and remanded with directions to order dismissal of the complaint herein on the grounds that:

   a. *In personam* jurisdiction was lacking as to all defendants;

   b. Venue was improperly laid in the Northern District of Illinois;

   c. There was insufficient evidence to sustain a finding of nuisance, and neither of the complaining states require the point source controls sought and imposed herein;

   d. FWPCA controls both the cause of action and the remedy, leaving no function for the federal common law of water pollution nuisance;

   e. The action should have been referred in the first instance to the Wisconsin Department of Natural Resources or the EPA;

   f. The courts below should have deferred to the result obtained in the statutory Wisconsin state court proceeding enforcing Milwaukee's FWPCA permits prior to the entry of judgment below.

2. In the alternative, that the portion of the Court of Appeals' decision relating to the elimination of sewer overflows should be reversed and remanded with directions that:

a. The issues involved in this portion of the decision be referred to the Wisconsin Department of Natural Resources or the EPA for a determination of the cost-effective level of sewer overflow control, and the proper timing for implementation of such control under FWPCA, consonant with the availability of federal funding, and that such determination be implemented by the Court of Appeals; or

b. The cause be remanded to the District Court, before a judge other than the original trial judge, for a new trial on the issues of the degree to which sewer overflows should be controlled pursuant to FWPCA and the timing of the implementation of such control measures, with particular consideration to be given to the availability of federal funding and the point source controls imposed by the plaintiff states in respect of discharges in their own jurisdictions.

3. That the Court award costs to the petitioners and such other and further relief as the Court may deem just and appropriate.

Respectfully submitted,

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